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In The

Supreme Court of the United States

October Term, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Henry Normandeau,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the rights and protections afforded all citizens by the Constitution and the decisions of this Court bar the exercise of an Indian tribal government's authority, including a requirement to exhaust tribal administrative and judicial remedies, to regulate farming and ranching by nonmembers, who have no rights of political participation in tribal government, on land they own in fee within an open reservation and from which they cannot be excluded?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ross Middlemist, Wayne Maughan, and the Flathead Joint Board of Control (hereinafter collectively referred to as "Middlemist"), respectfully request this Court, pursuant to 28 U.S.C. § 2101(e) and Sup. Ct. R. 11, to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the Order entered in this matter on February 12, 1993, by the United States District Court for the District of Montana, Missoula Division, and appealed to the Court of Appeals March 9, 1993, which docketed the appeal April 2, 1993, as No. 93-35315.

OPINION BELOW

The Opinion and Order of the U.S. District Court which Middlemist asks this Court to review has not been reported and is printed in the Appendix to this Petition at A-1 through A-15.

JURISDICTION

The U.S. District Court entered its Order February 12, 1993. Its jurisdiction rested on 28 U.S.C. § 1331 and 28 U.S.C. § 1361. Middlemist filed a Notice of Appeal to the Ninth Circuit Court of Appeals March 9, 1993. The Court of Appeals docketed the appeal, No. 93-35315, April 2, 1993. The jurisdiction of the Court of Appeals rests on 28 U.S.C. § 1291. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, Treaty, statutes, ordinance, and regulations, relevant portions of which are set out verbatim in the Appendix:

> Constitution of the United States of America, Article IV, § 2 and § 4, Amendment V, Amendment VII, Amendment IX, Amendment X, Amendment XV (A-46-47);
>
> Treaty of Hellgate, July 16, 1855 (A-48-49);
>
> Flathead Allotment Act, Act of April 23, 1904 (33 Stat. 302) (A-50-51);
>
> Confederated Salish and Kootenai Tribes' Ordinance 87A, Aquatic Lands Conservation Ordinance (A-38-40);
>
> Ordinance 87A Regulations (A-41-44);
>
> Declaratory Judgment Act, 28 U.S.C. 2201-2202 (A-52).

STATEMENT OF THE CASE

1. Introduction.

This case concerns the assertion of power by a tribal government to regulate and punish land use by people who are not tribal members on land they own in fee, contrary to the well-established general rule laid down by this Court in *Montana v. United States*, 450 U.S. 544, 565 (1981) and consistently reaffirmed since. *Cf. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492

U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).[1] It concerns the assertion of authority by a government which does not allow nonmembers, including Middlemist, to vote in elections, hold office, or sit on a jury or as a judge. It concerns the threat of enforcement action, including unpermitted and warrantless searches and destruction and removal of property, for failure to submit to the authority of a government which is not limited by either the Constitutional rights of nonmembers, including the Bill of Rights, *Talton v. Mayes*, 163 U.S. 376 (1896), or the Constitutional restraints on State and Federal action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 39, 57 (1978).

Ultimately, this case concerns whether the fundamental understanding of citizens that they have the inalienable right to political participation in the governments under which they must live also applies to those who through congressional policies have come to live and own property on reservations but are not tribal members and

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[1] The issue of tribal jurisdiction over nonmembers engaged in activity on non-tribal fee land raised by *Middlemist* is similar to the issues now before this Court in *State of South Dakota v. Bourland*, No. 91-2051, October Term, 1992 (argued March 2, 1993). The difference between these cases is that in *Bourland* the geographic area in which tribal jurisdiction over nonmembers is at issue is fee land owned by the federal government. In *Middlemist*, the fee land at issue is owned by individuals who are not tribal members. Should the Court decide to establish principles of tribal jurisdiction applicable throughout the country and ground its decision of these issues on either the constitutional principles or the limits of tribal jurisdiction over nonmembers established in its decisions, it would be appropriate for the Court to review and decide *Middlemist* as well as *Bourland*.

are therefore excluded from participation in tribal government.[2] Middlemist does not contest the legitimacy of tribal sovereignty or tribal authority over those who are members and have consented to tribal government. Nor does Middlemist contest tribal sovereignty over land owned by the Tribe or held in trust for it. But Middlemist strenuously disputes the legitimacy of tribal assertions of authority over nonmember activity on fee land as contrary to the fundamental basis of our constitutional system.

The salient facts presented by the Petitioners, Ross Middlemist, Wayne Maughan, and the Flathead Joint Board of Control (JBC)[3], are simple, paradigmatic and common, arising frequently on reservations Congress opened to nonmember settlement and which now contain populations with a high percentage of nonmembers and significant agricultural areas owned by nonmembers: The individual landowners are not members of the resident

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[2] The Tribes involved in this matter are the Confederated Salish and Kootenai Tribes ("CSKT") of the Flathead Reservation, located in northwestern Montana.

[3] The JBC is a local governmental entity formed under the statutes of Montana to act as a central operating authority for the three Irrigation Districts which comprise it. (§§ 85-7-1601, et seq., Mont. Code Ann.) The Montana statutes pertaining to irrigation districts are found at Title 85, Chapter 7, Parts 1-22, Mont. Code Ann. These Irrigation Districts were formed, at the specific direction of Congress, under state law to represent the owners of fee land. Act of May 10, 1926 (44 Stat. 453, 464). Included in the 70-odd statutes enacted by Congress specifically addressing this irrigation project is a provision, in the authorizing Act of May 29, 1908 (35 Stat. 448), requiring the transfer of the operation and management of the irrigation project to the landowners it serves. These landowners, tribal members and nonmembers, are now represented, at the insistence of Congress, by state-chartered Irrigation Districts, which are local governmental entities under state law.

Tribes (Complaint, paragraphs 1, 4, 6; A-18)[4]; they own their land in fee and acquired it pursuant to the allotment laws of the United States (C-1, 11, 19, 20; A-22, 23)[5]; their land is situated in an "open," completely agricultural area of the reservation (C-47-70; A-28-31); they cannot be excluded from their land (C-65, 66, 68, 69; A-31); they wish to undertake on their land small projects common in the course of farming and ranching (C-12, 13, 23, 24, 25; A-22, 24); the tribal government claims to have jurisdiction to regulate their land use and to enforce compliance by unpermitted access to private land for inspections, by issuing compliance and removal orders, by levying fines of up to $500.00 per day, and by removing projects, at the landowner's expense, not voluntarily brought into compliance. (C1, 34, 41-46; A-19, 26, 27-28; A-38-44).

Notwithstanding the clear violation of the limits of tribal jurisdiction presented by the CSKT government's

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[4] The Complaint is in the Appendix at A-17 to A-37. When referencing the Complaint, Petitioners provide citations to specific paragraphs in the Complaint as "C-___" and the Appendix. Under the standards applicable to motions to dismiss, Rule 12(b)(6), Fed.R.Civ.Pro., the well-pleaded factual allegations of the Complaint are taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (reversing decision upholding grant of motion to dismiss in civil rights action.)

[5] General Allotment Act, 25 U.S.C. § 331, et seq., and Flathead Allotment Act (Act of April 23, 1904, 33 Stat. 302). As a result of these acts nonmembers now own in fee (according to CSKT tribal government statistics) 490,120 acres of the 1.2 million acre Reservation; and of the Reservation population of 21,259, 3,000, or 14 percent, are tribal members. (C-60; A-30.)

assertion of authority here, the court below abstained from exercising its jurisdiction to vindicate Middlemist's rights, instead requiring exhaustion of all tribal remedies, administrative and judicial, even though there are no tribal proceedings ongoing. Because of the clear conflict between the tribal assertion of jurisdiction and the lower court's decision on the one hand and the Constitutional and decisional limits on tribal jurisdiction on the other, and in view of the fundamental nature of the rights at stake and the wide-spread importance of this issue which affects nearly 400,000 individuals living on reservations nationwide, Middlemist has requested review before judgment in the Court of Appeals. Without this Court's review, Middlemist's meritorious request for federal declaratory and injunctive relief from this groundless assertion of tribal authority will be enmeshed in years of tribal, and perhaps federal, proceedings. Without doubt, this will chill and perhaps freeze Middlemist's fundamental right to make use of their property, which is subject to federal and state regulation. (C-14, 15, 29; A-22, 25.)

2. Facts

Ross Middlemist, a third-generation rancher on the Flathead Reservation, residing in Sanders County, Montana, must replace a dilapidated stock water tank fed by a small natural spring which arises on his own property and, after running approximately 100 yards, disappears into the ground, still on his property. (C-11, 12; A-21, 22.) He is not a tribal member and has no voice in tribal government. (C-4; A-20.)

This project comes within the asserted jurisdiction of tribal government under its Aquatic Lands Conservation Ordinance ("ALCO"), also known as tribal ordinance 87A. (C-1, 34; A-19, 26.) The Agricultural Stabilization and Conservation Service ("ASCS") informed Mr. Middlemist that while the project qualified for federal funding of $1,050.00[6] such funding would be withheld until he obtained a tribal permit pursuant to ALCO, in addition to obtaining permits from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks. (C-14, 15, 17; A22, 23.)

Wayne Maughan, a second-generation farmer on the reservation, residing in Lake County, Montana, like Mr. Middlemist, is not a tribal member and has no voice in tribal government affairs. (C-6, 20; A-20, 23.) In cooperation with the JBC and utilizing funds provided by the JBC for a water conservation demonstration project,[7] Mr.

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[6] In the Complaint, this amount was stated as $1,000.00. (C-14; A-22.) However, a subsequent letter to Mr. Middlemist from the ASCS revealed the available funding to be $1,050.00. This letter was attached to Middlemist's brief in response to the CSKT government's motion to dismiss as part of Exhibit A.

[7] The JBC has participated in this project because it will improve water quality by greatly reducing or eliminating discharges from the small reservoir behind the dam through increased storage capacity and reuse of irrigation return flows, and because by capturing more runoff and irrigation return flows for reuse, the need of Mr. Maughan for deliveries of water to his farm will be decreased, thereby making more water available for upstream irrigators. (C-24, 26, 27; A-24.) Accordingly, the JBC passed a resolution November 13, 1990, numbered Resolution No. 90-04, and set aside $3,000.00 to help pay for the project. (C-25; A-24.)

Maughan desires to repair a small dam located on his own fee land. (C-23, 24, 25; A-24.)

This project is also within the asserted jurisdiction of tribal government under ALCO. Like Mr. Middlemist, Mr. Maughan and the JBC were advised by the U. S. Government, acting through the U. S. Corps of Army Engineers, that, in addition to applying for a variety of federal, state and local government permits and approvals,[8] they had to apply to the CSKT government for a permit pursuant to ALCO as a condition precedent to undertaking the proposed conservation activities. (C-30; A-26.)

Under ALCO the CSKT government claims authority to regulate all activity – no matter how minor – planned on wetlands located within the exterior boundaries of the reservation, whether that land is owned by the United States or the CSKT government, tribal members, or, as in the cases of Messrs. Middlemist and Maughan, by non-

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[8] Mr. Maughan and the JBC have applied for a "404 permit" from the Army Corps of Engineers pursuant to the Federal Clean Water Act; a Montana Pollutant Discharge Elimination System ("MPDES") permit from the State Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES"); a "124" Stream Preservation Act permit from Montana State Department of Fish, Wildlife and Parks; a "310" Natural Stream Bed and Land Preservation Act permit from the Lake County Soil Conservation District; a "3A" permit related to a short-term turbidity variance during construction, from the DHES; and a flood plain development permit from the State Department of Natural Resources and Conservation ("DNRC"). (C-29; A-25.)

members who propose to undertake activity on their own fee land. (C-34, 41, 42, 43; A-26, 27.)[9]

The CSKT Department of Natural Resources administers ALCO through the Shoreline Protection Office ("SPO"). (C-38; A-27.) The terms of ALCO require the submission of plans to the SPO for review, approval, modification, rejection, and issuance of a permit for any project on wetlands prior to doing any work. (ALCO, Part 4, §§ 1, 3; A-38, 39.) ALCO imposes fines of up to $500.00 per day for each violation of its provisions, including failure to submit plans, acquire a permit, comply with conditions and modifications dictated by the SPO, or continuance with a disapproved project. (ALCO, Part 6, § 2, ALCO Regulations, §§ 5.1, 5.9; A-39, 40, 41, 42.)[10] It also provides for the imposition of remedial measures at the expense of the noncomplying person, as well as removal of a project and restoration of the physical surroundings. (ALCO, Part 6, § 2, R. 5.5, 5.7, 5.8, 5.9; A-39, 40, 42, 43, 44.) The ordinance also purports to authorize CSKT government officials and employees unfettered and

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[9] The tribal government has advertised the applicability of ALCO throughout the Reservation as follows:

> "Private individuals; corporations, local, county, state, tribal and federal government agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation *must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.*"

(Emphasis in original.) (A-45.) This advertisement was attached as Exhibit D. to Middlemist's brief in response to the CSKT government's motion to dismiss.

[10] Hereinafter ALCO Regulations are cited as "R. ___."

unpermitted access to search, without a warrant, any property within the reservation, without regard to landownership, if a violation is suspected. (ALCO, Part 6, § 1; A-39.) Implementing regulations provide that the SPO may enter another's land, again without a warrant, and "undertake the removal of the project and restoration of the underlying property" at the cost to the landowner. (R. 5.8; A-43.)

Middlemist challenges the CSKT government's assertion of regulatory jurisdiction over nonmember activities on fee land as patently unconstitutional and violative of the limits of tribal jurisdiction established by this Court's decisions.[11] Despite this conviction, Middlemist fears the imposition of heavy fines and penalties for any refusal to submit to tribal authority. Consequently, Middlemist sought relief by filing an action for declaratory and injunctive relief in the United States District Court for the District of Montana, naming federal and tribal defendants

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[11] On the Flathead Reservation such assertions of jurisdiction have become the rule rather than the exception despite any limits established by this Court. For example, since the decision in *Montana*, 450 U.S. 544 (1981), the Tribal Council has enacted at least four ordinances where it claimed jurisdiction over nonmembers on fee land. These ordinances are 87A, at issue here; 44D, Hunting and Fishing Ordinance; 89B, Water Quality Management Ordinance (enacted after *Brendale*, 492 U.S. 408 (1989)); and 64A, Shoreline Protection Ordinance. Review by this Court of tribal government's jurisdiction over nonmembers under 64A has been sought and denied in the past. *Namen v. CSKT*, 459 U.S. 977 (1982), cert denied; Rehnquist J. and White J. dissenting. See *Namen v. CSKT*, 665 F.2d 951 (1982). However, the Ninth Circuit's decision in *Namen* rested on its holding that the CSKT own the bed and banks of the south half of Flathead Lake. The CSKT have no ownership interest in the lands in question here.

for their part in promulgating, approving, implementing, and supporting the application of ALCO against the Plaintiffs.[12] (Complaint; A-17-37.)

3. The Decision Below.

The federal and tribal defendants moved to dismiss on various grounds. In granting these motions the District Court ruled only on the issues raised by the abstention doctrine as set out in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and Ninth Circuit interpretations of those decisions. Even though there are no ongoing tribal proceedings, the lower court refused Middlemist declaratory relief pursuant to 28 U.S.C. § 2201-2202, requiring that all tribal administrative and judicial remedies first be exhausted. In dismissing Middlemist's argument that an exception to the doctrine was present here because the CSKT government's assertion of jurisdiction patently violates the Constitution and the limits of tribal jurisdiction defined by this Court in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Bands of Tribes of the Yakima Nation*, 492 U.S. 408 (1989), the court below refused to

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[12] Middlemist named the individual tribal government officials as Defendants based on the principles of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), and its progeny, which are applicable to tribal government officials acting beyond their legal authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); see also *BNRR v. Blackfeet Tribe, et al.*, 924 F.2d 899, 901-902 (1991): "Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law."

rely on or even examine this Court's decisions defining tribal civil regulatory jurisdiction over nonmembers on fee land or to credit the constitutional arguments raised by Middlemist. Cf. *Duro v. Reina,* 495 U.S. 676 (1990).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Imposition of Tribal Governmental Power Over Nonmembers On Their Own Fee Land In Violation Of Fundamental Constitutional Rights Is Of Imperative Public Importance To Hundreds Of Thousands Of People Nationwide.

The assertion of the CSKT government's authority threatens Middlemist's fundamental constitutional rights to full political participation in the government under which they must live, *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964), and all the other civil liberties these rights preserve. *Reynolds v. Sims,* 377 U.S. 533, 562 (1964). Nationwide, almost 400,000 individuals who are not tribal members live on 280 Indian reservations and are in the same legal position in relation to the local tribal governments as Middlemist.[13]

In this respect, this case rests on the same constitutional and jurisprudential foundations as a number of prior cases in which this Court granted a writ of certiorari before judgment in an Appeals Court to ensure the protections of the Constitution extended to all people.

[13] See footnote 19 and accompanying text.

City of New Orleans v. Barthe, 376 U.S. 189 (1964) (affirming district court order desegregating public parks); *Bolling v. Sharpe*, 344 U.S. at 3 (1952) (certiorari petition invited), 344 U.S. 873 (1952) (cert. granted) 347 U.S. 499 (1954) (desegregation of public schools in the District of Columbia); *United States v. Thomas*, 361 U.S. 950 (1960), 362 U.S. 58 (1960) (voting rights); *Hannah v. Slawson*, 361 U.S. 910 (1959) (voting rights); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (employment status restored); see also *Griffin v. County School Board of Prince Edward County*, 375 U.S. 391 (1964), 377 U.S. 218 (1964) (review granted prior to judgment to rectify respondent's defiance of prior ruling ordering public school desegregation).[14]

As this Court has recently noted, governmental regulation can vary from a minor incidental burden to a crushing weight. *Lucas v. South Carolina Coastal Council*,

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[14] Moreover, to the extent the issues here are not resolved on constitutional grounds but on an analysis of the effects of Acts of Congress (General Allotment Act, 24 Stat. 388 (1887); Flathead Allotment Act, 33 Stat. 302) on tribal Treaty rights to exclude nonmembers, *Middlemist* is analogous to earlier cases decided by this Court after issuing a writ before judgment in an Appeals Court on the grounds that the proper construction of the statutes involved was of wide public significance and the cases presented similar or identical questions. *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (construing Emergency Price Control Act); *White v. Mechanics Securities Corp.*, 269 U.S. 283, 299 (1925) (construing the Trading with the Enemy Act); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1962) (construing jurisdictional scope of National Labor Relations Act); *Johnson v. United States Shipping Board*, 280 U.S. 320, 324-25 (1930) (construing the Suits in Admiralty Act); and see *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (constitutionality of federal sentencing guidelines issued under Sentencing Reform Act).

___ U.S. ___, 112 S.Ct. 2886 (1992). If the power to tax is the power to destroy, *McCulloch v. Maryland*, 4 Wheat 316, 431 (1819), the power to regulate is the power to dictate the price or conditions of continued existence. And this power may ultimately destroy its object as surely as taxation. *Lucas*, ___ U.S. ___, 112 S.Ct. 2886.

The legislative and regulatory powers of government are balanced by the fact the governed have rights of full political participation. They consent to government in exchange for these rights.[15] These rights are among the most important rights of citizens safeguarded by the Constitution as they are preservative of all other civil liberties. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the

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[15] Moreover, consent is given not only for these rights but also for the protections afforded by the Constitution to those who find themselves at the mercy of the majority which has approved of a particular governmental action. Thus, the Constitution affords certain baseline protections beyond which government may not pass. These protections, including the right to just compensation for a governmental taking, are embodied in the Bill of Rights. Through the doctrine of incorporation the fundamental protections guard citizens against the actions of either of the two sovereigns established in the Constitution – the federal government and the states. Since tribal sovereignty is extraconstitutional and tribal governments are not constrained by the Bill of Rights, *Talton v. Mayes*, 163 U.S. 376 (1896), these basic protections neither limit tribal governmental actions nor protect those over which it rules.

> most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

In the context of nonmembers falling under a tribal government's power, however, such rights do not exist. Therefore, no safeguards exist. The strict preservation of these rights and their protection from limitation in the absence of the utmost justification constitutes the consideration from the government in return for the consent of the governed. Indeed, the Court expressed a fundamental, immutable tenet of our system when it said:

> In this Nation each sovereign governs only with the consent of the governed.

Nevada v. Hall, 440 U.S. 410, 426 (1979).

In direct contravention of this animating principle of government (to which the CSKT government itself adheres in dealing with tribal members), the CSKT government asserts its regulatory jurisdiction over nonmember land use on their own fee land. It claims to possess such authority while lacking any constitutional basis for its sovereignty. *United States v. Kagama*, 118 U.S. 375, 379 (1886); *United States v. Blackfeet Tribe*, 364 F.Supp. 194, 195 (D. Mont. 1973) ("As applied to Indian Tribes 'sovereign' means no more than within the will of Congress."); see also *Oliphant v. Schlie*, 544 F.2d 1007, dissent of Kennedy, J., at 1014, n.3 (9th Cir. 1976), reversed, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Middlemist challenges these assertions of jurisdiction over the lives, livelihoods, and land of nonmembers as patently unconstitutional because under tribal jurisdiction they are literally at the mercy of a government in which they can

exercise no rights to participate and thereby affect its actions.

These issues are of wide significance. Nationally, of the 780,028 people living on Indian reservations, at least 47.3 percent are not tribal members.[16] Pursuant to the General Allotment Act, 25 U.S.C. § 331 et seq., and other Acts of Congress, these nonmembers have come to lawfully hold fee title to many millions of acres on reservations. See *Brendale*, 492 U.S. at 436, n.1, opinion of Stevens, J.

On the Flathead Reservation alone, nonmembers, according to the CSKT government's statistics, own in fee approximately 490,120 acres.[17] Of the 113,000 acres within the three Irrigation Districts which comprise the JBC, approximately 90 percent is owned in fee by nonmembers. According to U.S. census statistics the population of the Flathead Reservation is 21,259. (C-60; A-30.) Of this

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[16] U.S. Department of Commerce, Bureau of the Census, News Release July 11, 1991, Table 1. These census statistics reflect the race and not the tribal affiliation of the population. Therefore, a portion of the *Indian* population living on Reservations, which is 54.1 percent of the total, would not be tribal members. Thus, the percentage of *nonmembers*, whether Indians or not, living on reservations exceeds 47.3 percent.

[17] In the Complaint, the amount of nonmember land owned in fee, as well as other land ownership facts, were approximations based on the best available information. (C-48; A-28.) It was there stated that nonmembers owned in fee approximately one-half of the reservation area, which totals1.2 million acres. Since the filing of the Complaint, the CSKT submitted information to the federal government, which the Petitioners obtained through inspection of files open to the public, giving the more precise figures of land ownership found in this Petition.

total, 3,000 or 14 percent are tribal members, and only they enjoy rights of participation in tribal government. (*Id.*)

Tribes are afforded wide latitude to govern in accordance with their own culture and traditions, *Duro v. Reina*, 495 U.S. 676 (1990), even to the point of taking actions offensive to the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 39, 56, n.7 (1978). Clearly, then, the CSKT government's claim to sovereign authority over nonmembers cannot be viewed as merely another layer of governmental regulation nor can it be viewed as a de minimis burden. The extraconstitutional nature of tribal power – both its origin and obligations to those it would govern – as the basis of tribal authority over nonmembers requires that it be narrowly limited and clearly defined. The extraconstitutional nature of tribal power is "all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro*, 495 U.S. at 694; citing the dissent, Stevens J., in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982).

Only timely review and decision by this Court, based on the holding that the CSKT government lacks the jurisdiction it asserts here because of the constitutional protections afforded Middlemist, will resolve the issue on a stable and unshakable foundation.

II. Middlemist is Entitled to Have This Matter Resolved in a Federal Forum Because The CSKT's Assertion of Jurisdiction Defies the Fundamental Limitations upon Tribal Sovereignty Established by this Court.

A. The Lower Court Should Not Have Abstained Because The CSKT's Assertion of Jurisdiction Defies The Limits of Their Power Over Non-members Established by This Court.

Lacking any textual source in the Constitution for exercising sovereign power, tribal jurisdiction over non-members has been closely cabined by this Court. Indeed, the Court has recently stated that Tribes possess "very narrow powers . . . over the conduct of non-Indians within their reservations." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S.Ct. 683, 692 (1992) (referring to *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989); and *Montana v. United States*, 450 U.S. 544, 566 (1981)).

In *Montana*, the Court clearly set out the general rule that tribal governments lack jurisdiction over nonmember activity on fee lands. *Montana*, 450 U.S. at 564-565. It grounded this rule on the principles enunciated in *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and their most distant predecessor, *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87 (1810), to the effect that through incorporation into the United States Tribes had been divested of the "right of governing every person within their limits except themselves." *Oliphant*, 435 U.S. at 209. It then recognized that a tribe *may* "retain inherent sovereign power" to regulate

some nonmember activity on fee lands where the nonmember has entered consensual relations (not applicable here) with a Tribe or the nonmember activities "so threaten the Tribe's political or economic security, as to justify tribal regulation." *Montana*, 450 U.S. at 565-566.[18]

In *Brendale*, a clear majority of the court (6-3) held as to the nonmember fee land in the "open" area of the reservation that the Yakima Tribe lacked jurisdiction to enforce its zoning ordinance. (The Petitioners' land here is indisputably in the "open" area of the reservation.) The plurality opinion of Justice White and the concurring opinion of Justice Stevens are in harmony as to the effect of the loss of the right of the tribe to exclude nonmembers. The incorporation of Tribes into the United States and their loss of the power to exclude as the result of Acts of Congress forever altered the "platonic notions" of tribal sovereignty. *County of Yakima*, 112 S.Ct. at 687. While the form may remain the substance now consists only of those powers not inconsistent with Tribes' dependent status. Recently, the Court indicated this left Tribes "very narrow powers" over non-Indians. *Id.*, at 692. Yet, the tribal government here refuses to acknowledge the limits of its authority over nonmembers.

Such action flies in the teeth of this Court's decisions in *Montana* and *Brendale*.[19] These decisions cannot be

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[18] Middlemist argues the careful wording of this language is a recognition of the exceptional circumstances required to justify tribal jurisdiction in this situation because it entails the loss of the fundamental rights discussed above.

[19] Not to mention the Court's decisions before and after these cases which provide a definitive framework of analysis

distinguished on any principled basis. They control the issue and clearly state that in the factual situation presented here the tribal government has no jurisdiction. Much more than a mere claim to authority must be required to "justify tribal regulation" of nonmember activity on fee land. *Montana*, 450 U.S. at 565-566. Indeed, for a Tribe to have a protectable interest vindicable in federal court "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Brendale*, 492 U.S. at 430-431. Clearly, this does not leave the CSKT government without remedies if it perceives a threat arising from Middlemist's activities, which seems unlikely given the nature of the projects and the State and Federal regulation already legitimately in force. But even a perceived threat is, at best, an ephemeral basis on which to assert sovereign authority. *Brendale*, 492 U.S. at 430-431. Yet, without timely intervention by the Court and clear demarcation of the tribal governments' jurisdiction over nonmembers based on constitutional principles, the defiance of the limits established by this Court and the Constitution of lawful tribal authority exemplified by ALCO cannot be effectively challenged.

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illustrating the tribal government's assertion of jurisdiction here is barred. *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683 (1992).

B. The Abstention Doctrine Should Not Apply Where The Challenged Action is Clearly Violative of the Constitution and Tribal Jurisdiction and Abstention Serves Only to Delay Resolution of the Matter and Exhaust Petitioners' Ability to Vindicate Their Federal Constitutional Rights.

The decision below promotes two vices. First, the tribal abstention doctrine applied in the absence of ongoing tribal proceedings entails more deference to tribal institutions than federal courts accord States. Secondly, abstention in the absence of ongoing tribal proceedings will chill and perhaps freeze the fundamental rights of nonmembers such as Middlemist to make use of their property by eliminating their federal right to a declaratory judgment pursuant to 28 U.S.C. § 2201.

As argued above, the challenged tribal action clearly violates Petitioners' constitutional rights and exceeds jurisdictional limits established by this Court. "When the unconstitutionality of the particular . . . action under challenge is clear, a federal court need not abstain from addressing the constitutional issue. . . . " *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 756 (1986). This rationale applies here and perhaps with even greater force since the fundamental rights of political participation are in issue. *Houston v. Hill*, 482 U.S. 451, 467 (1987) (courts should be "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment.") Indeed, Middlemist has invoked the exception to abstention based on these very arguments, but the district court refused to examine the decisions and constitutional limits of tribal jurisdiction, instead looking only to abstention principles.

The tribal abstention doctrine, animated by the salutary goals of Congress embodied in the Indian Self-Determination Act, 25 U.S.C. §§ 450, 450a, and Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, (of which neither mentions nor implies, even once, tribal jurisdiction over nonmembers) was never meant to cloak from scrutiny assertions of power clearly in excess of limits established by the Constitution and this Court. In the *National Farmers* and *Iowa Mutual* decisions, the Court explicitly recognized exceptions to the doctrine to allow federal courts to efficiently deal with such claims. *National Farmers*, 471 U.S. at 856, n.21; *Iowa Mutual*, 480 U.S. at 19, n.12.

Moreover, aside from the applicable exceptions, the lack of ongoing tribal proceedings renders the abstention doctrine itself inapplicable. The doctrine was not intended to deprive federal plaintiffs of judicial remedies conferred by Congress in the Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202. In the absence of ongoing tribal proceedings, the requisite factors to justify abstention are not present. In both *National Farmers* and *Iowa Mutual* the Federal court was asked to intervene in ongoing tribal court proceedings concerning a civil tort action. Thus, a central element of the Court's decision in those cases to allow district courts to abstain from their "virtually unflagging" duty to exercise their jurisdiction, *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817 (1976), was whether there was an ongoing tribal proceeding.

Here, there are no ongoing tribal proceedings, whether judicial or administrative, to which the federal

court could defer.[20] However, in conflict with the general principles of tribal abstention established by this Court in *National Farmers* and *Iowa Mutual* and in conflict with the general principles requiring Federal courts to exercise their jurisdiction, the Ninth Circuit Court of Appeals has essentially imposed an "unflagging duty" on district courts to *abstain* anytime an issue of tribal jurisdiction arises in any context.[21]

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[20] In fairness to the district court, the decisions of the Ninth Circuit Court of Appeals expounding on the abstention principles set down by this Court have gone far beyond the doctrine enunciated in *National Farmers* and *Iowa Mutual*, leaving the federal district courts no room to analyze whether to exercise their jurisdiction or abstain. In *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (1991), the Ninth Circuit stated that when the issue in dispute is a "reservation affair," "the federal court has no option but to defer." Thus, the issue has been transformed from whether the factors of comity would allow abstention to a more mechanical question of whether the matter arises on a reservation and is, therefore, a reservation affair. *Id.*

[21] Relief from this "mandatory" deference to tribal courts has been allowed by the Court of Appeals on two occasions. In the first *BNRR v. Blackfeet Tribe*, 924 F.2d 899, 901, n. 2, the Court of Appeals explained abstention was not required, in part, because "no proceeding is pending in any tribal court. . . . " However, in the second case in which abstention was not required *Stock West Corp. v. Taylor*, 942 F.2d 655, 663, (1991), the court described the *Blackfeet Tribe* holding as an anomaly tolerated, primarily, because the ultimate decision of the court on the jurisdictional issue favored the Tribes. The *Stock West* court then also declined to abstain, citing the same rationale, but also noting that when the issue in dispute is a "reservation affair," "the federal court *has no option but to defer.*" *Stock West*, 942 F.2d at 661.

The tribal abstention doctrine is clearly patterned after the doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and elaborated in later cases.[22] A central and continuing requirement for abstention in the *Younger* context is that there is an ongoing state proceeding in favor of which the federal court should abstain. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). If there is no ongoing state proceeding and a plaintiff has invoked the federal court's jurisdiction, *Younger* abstention does not apply. "[T]he relevant principles of equity, comity and federalism have little force in the absence of the pending state proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974). To require abstention absent an ongoing proceeding would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case. . . . " *NOPSI*, 491 U.S. at 368. Indeed, to require abstention absent an ongoing tribal proceeding "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) (citations omitted). Abstention in this context would place a plaintiff "between the Scylla of intentionally flouting [tribal] law and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed in enforcement proceedings." *Id.*, quoting *Steffel*, 415 U.S. at 462.

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[22] The only abstention decisions cited in *National Farmers* were *Younger* abstention cases; and the same is true for the *Iowa Mutual* decision except for one reference to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

As in the *Younger* abstention context, ignoring this basic requirement here would strip from nonmembers needing to challenge abuses of power by tribal governmental officials the remedy provided by Congress in the Declaratory Judgment Act. (28 U.S.C. 2201, et seq.) Congress enacted this remedy specifically to mesh with the doctrine first enunciated in *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), creating an exception to the doctrine of sovereign immunity and allowing a plaintiff to name a governmental official acting in excess of lawful powers as a defendant. *Steffel v. Thompson*, 415 U.S. 452, 463-467 (1974). Middlemist has employed this very remedy here. (C-Relief Requested; A-36-37.)

Under the district court's ruling, Middlemist would be required to exhaust not only tribal judicial remedies but, prior to that, administrative remedies as well. Middlemist disputes the authority of the CSKT government to impose its administrative regulatory process on nonmember activities on fee land. Yet Middlemist cannot risk incurring the penalties imposed on nonmembers if they violate the CSKT ordinance. Certainly, this is neither the intended nor desired result of the abstention doctrine enunciated in *National Farmers*.

Without timely intervention by this Court, then, the defiance of the lawful limits of tribal authority as established by this Court and the Constitution, which Petitioners challenge here, cannot be effectively remedied. If the tribal abstention doctrine does not include the requirement that there be an ongoing tribal court proceeding, federal court's will be required to give Tribes greater deference than they do states. Additionally, plaintiffs wishing to invoke their federal statutory right under

the Declaratory Judgment Act to challenge governmental abuses of power without actually violating the statute will not only be stripped of this right but left with no timely remedy whatsoever.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED this 30th day of April, 1993.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST,
WAYNE W. MAUGHAN
FLATHEAD JOINT BOARD
OF CONTROL,

Plaintiffs,

-v-

SECRETARY OF THE
UNITED STATES
DEPARTMENT OF
INTERIOR, Manuel Lujan,
Jr., et al.,

Defendants.

CV 91-155-M-CCL

OPINION AND
ORDER

(Filed Feb. 12, 1993)

* * *

The Joint Board of Control (JBC) and two individuals have filed this action against the officials of the Department of Interior and individual officials of the Confederated Salish and Kootenai Tribes (Tribes) alleging that the Tribes have no authority to exercise regulatory jurisdiction over activities of non-members on the Flathead Reservation on "fee" lands. Plaintiffs seek declaratory and injunctive relief barring the Tribal government from applying Tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance (ALCO), against the Plaintiffs anywhere and under any circumstances. Plaintiffs are also suing the United States for its role in approving ALCO

and for allegedly providing funding to develop, implement and enforce the Ordinance. Against the Federal Defendants, Plaintiffs seek relief in the nature of mandamus requiring the disapproval of the Ordinance as it applies to nonmember activity.

Tribal Defendants and Federal Defendants have each moved to dismiss the action. Tribal Defendants argue that the court lacks personal jurisdiction over the Tribal governmental officials named in the suit because of the Tribes' sovereign immunity; that Plaintiffs lack standing and capacity to sue; and that Plaintiffs have failed to exhaust Tribal remedies.

The Federal Defendants move to dismiss on the grounds that the Tribes are a necessary and indispensable party to this action and that the actions of the Federal Defendants are protected by sovereign immunity. Federal Defendants also assert that Tribal remedies have not been exhausted.

FACTUAL BACKGROUND

ALCO is a civil regulatory ordinance designed to effectuate the Tribal and federal goals of protecting the quality of Reservation aquatic habitat. The Tribal Council approved ALCO on December 13, 1985. The Secretary of Interior approved ALCO in accordance with the provisions of the Tribal Constitution on December 20, 1985. The Tribes proposed regulations to implement ALCO and published legal notice of the proposed regulations for public comment. The regulations were adopted pursuant to the Tribal Administrative Procedures Ordinance after a comment period. Neither the JBC nor the individual

Plaintiffs sought to challenge the regulations during this notice and comment period.

Plaintiff Ross Middlemist is an irrigator served by the Flathead Irrigation and Power Project (FIPP) and is a constituent and member of the Joint Board of Control. His property lies within the exterior boundaries of the Reservation. Mr. Middlemist intended to engage in a project to improve a natural spring site on his property which he uses to supply a stockwater tank. On September 17, 1991, Middlemist went to the Agricultural Stabilization and Conservation Service (ASCS) in Sanders County and applied for funding for his project which was approved in the amount of $1,050. In October of 1991, Middlemist was informed by the ASCS that in addition to applying for permits for the project from the Army Corps of Engineers and the Montana Department of Fish, Wildlife, and Parks, he would have to apply for a permit from the Tribal Shoreline Protection Office pursuant to the terms of ALCO. Middlemist never applied for such a permit and, therefore, has never paid a filing fee nor been rejected by the Tribal agency. He has not done any construction on his improvement project.

Plaintiff Wayne Maughan also holds fee simple title to property within the exterior boundaries of the Reservation. He is also an irrigator served by FIPP and represented by the JBC. Mr. Maughan has an impoundment reservoir on his property which is fed by Maughan Creek. The dam on Maughan's property requires improvement for safety, water quality reasons, and to expand the capacity of the reservoir.

In their complaint, Plaintiffs allege that the improvement of this dam will improve the quality of the water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows. Additionally, it is believed that the improvement project will result in more water available for upstream irrigators by requiring less to be delivered to Maughan.

To facilitate this project, the JBC passed a resolution on November 13, 1990 and set aside a grant of $3,000 to help pay for the project asserting that the project will benefit the JBC and its constituents. The JBC retained an engineering firm to design and draft plans for the improvement of the dam. Plaintiffs Maughan and the JBC then began the process of applying for state and federal permits and approvals. They did not apply for a permit from the Tribal Shoreline Protection Office, paid no fees, and were not denied a permit by that agency.

Plaintiffs generally assert that the Tribes do not have authority over non-members and that the exercise of Tribal jurisdiction over them is violative of their constitutional rights. Plaintiffs list these rights as the right to vote and hold office in the government under which they live; the right to sit on a jury; the right to be judged by a jury of their peers; and the right to a jury trial in a civil matter.

DISCUSSION: EXHAUSTION OF TRIBAL REMEDIES

Though Defendants have stated various grounds in support of their motions to dismiss, the court finds that the issue of exhaustion of tribal remedies is dispositive of this action in its present posture.

It is well settled that the question of whether an Indian tribe retains the sovereign power to compel a non-Indian property owner to submit to the civil jurisdiction of the tribe gives rise to a federal question. The issue here is whether, in these circumstances, this court must defer exercising jurisdiction until such time as the Tribes' administrative and judicial forums have been exhausted.

In *Burlington Northern Railroad Co. v. Crow Tribal Council,* 940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit Court of Appeals stated:

> The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: "[E]xhaustion *is required* before such a claim may be entertained by a federal court." *National Farmers Union,* 471 U.S. at 857, 105 S.Ct. at 2454. In *Iowa Mutual Ins. v. LaPlante,* the Supreme Court said that "federal policy . . . directs a federal court to stay its hand," and "proper respect . . . requires" tribal remedy exhaustion. 480 U.S. at 16, 107 S.Ct. at 976. Therefore, non-Indian petitioners "*must* exhaust available tribal remedies." *Id.* The LaPlante Court emphasized that "*National Farmers Union requires* that the issue of jurisdiction be resolved by the Tribal courts in the first instance." *Id.*

BN v. Crow Tribe, 940 F.2d at 1245 (emphasis in original).

However, before deferring to a tribal forum, "a federal court must examine the circumstances of the individual case in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement." *Stock West Corp. v. Taylor,* 942 F.2d 655. (9th Cir. 1991). These purposes, as set forth in *National Farmers Union*

Insurance Company v. Crow Tribe, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), include the development of tribal self-government, practical considerations of judicial efficiency, and the benefits of tribal expertise and explanations.

Federal Law and Ongoing Proceedings

Plaintiffs initially argue that exhaustion is not applicable in this case because the asserted claims only raise issues of federal law and because there is no ongoing tribal proceeding involved. Exhaustion, however, cannot be avoided for either of these reasons.

Any dispute concerning the extent of tribal sovereignty and authority will involve questions of federal law. The Supreme Court recognized this fact in *National Farmers Union* when it stated that the determination of "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union*, 471 U.S. at 855-856. Even though these sovereignty issues involve federal law, the Court decided that such an examination "should be conducted in the first instance in the Tribal Court itself." *Id.* Therefore, the fact that the jurisdictional question falls under federal law and raises constitutional concerns does not defeat the exhaustion requirement.

Furthermore, the lack of an ongoing proceeding in a tribal forum does not negate the exhaustion requirement.

In *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991), it was held that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Id.* at 1407.

The court recognizes that in *Burlington Northern v. Blackfeet Tribe*, 942 F.2d 899 (9th Cir. 1991), the Circuit Court did not require exhaustion because the case presented issues of federal law and no proceeding was pending in tribal court. However, this particular holding has been called an anomaly by the Circuit Court itself in a subsequent case. *Stock West*, 942 F.2d at 633, note 7. Additionally, the clear statement in *Crawford* concerning pending proceedings raises serious questions concerning the validity of *BN v. Blackfeet Tribe* on the exhaustion issue. Therefore, in light of the Circuit Court's clear pronouncement on this issue in *Crawford*, the court finds that the lack of a tribal proceeding does not negate the exhaustion requirement.

Similarly, Plaintiffs rely on the holding of *Stock West* to support their contention that the lack of an ongoing tribal proceeding nullifies the exhaustion requirement. Plaintiffs' reliance on this case, however, is misplaced. The court in *Stock West* held that when an issue in dispute is a "reservation affair" or arises on the reservation, "the federal court has no option but to defer." *Stock West*, 942 F.2d at 661. In reaching its conclusion that the dispute in Stock West was not a "reservation affair," the court pointed to the lack of an ongoing tribal proceeding and the lack of issues related to tribal law. Therefore, the court merely viewed these facts as indicative of a non-reservation affair.

In this case, Plaintiffs have alleged that the subject waters and lands at issue are situated within the exterior boundaries of the Flathead Indian Reservation. Additionally, Plaintiffs are suing Tribal officials and seek to invalidate a Tribal ordinance. Unquestionably, this case is a "reservation affair" which triggers the mandatory exhaustion requirement. *Stock West*, 942 F.2d at 661; *Crawford*, 947 F.2d at 1408.

Policy Imperatives

Even if the dispute here constitutes a "reservation affair," Plaintiffs contend that exhaustion should not be required because none of the purposes for exhaustion set forth in *National Farmers Union* would be advanced in this case. Plaintiffs' contention, however, is not supported by the law or the facts.

In *National Farmers Union*, the Court stated that the first of the three policy imperatives behind exhaustion was based on the Congressional commitment "to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the legal and factual bases for the challenge." *National Farmers Union*, 471 U.S. at 856. Additionally, the court stated:

> Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has

> allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union, 471 U.S. at 856-857.

In *BN v. Crow Tribe*, which is controlling in this case, the Circuit Court addressed the *National Farmers Union* imperatives in the context of a case strikingly similar to the one at bar. In *BN v. Crow Tribe*, the plaintiffs filed suit in federal court seeking a declaratory judgment against tribal officials to invalidate a tribal civil regulatory ordinance as exceeding the Tribes' jurisdiction. In determining that the imperative of tribal self-government would be advanced by exhaustion, the court stated:

> The policy of tribal self-government and self-determination goes to the heart of this case. Through the challenged ordinance, the Tribe reasserts its commitment to sovereign authority over Reservation affairs. The ordinance establishes governmental mechanisms for exercise of that authority. Moreover, the ordinance identifies railroad services as vital to the Tribe's economic development.

BN v. Crow Tribe, 940 F.2d at 1245.

In this case, the Confederated Tribes have asserted their commitment to sovereign authority over Reservation affairs through Ordinance 87A which establishes governmental mechanisms for the protection of aquatic habitat on the Reservation. As in *BN v. Crow Tribe,* the challenged ordinance seems to be important to the well-being of the Tribes and their members for both health and economic reasons.

The policy imperatives concerning judicial efficiency and tribal expertise would also be advanced in this case through exhaustion. As in *BN v. Crow Tribe,* the Tribes are "in the best position to develop the necessary factual record for disposition on the merits. Without that tribal record the federal district court . . . [faces] an action based on an uninterpreted tribal ordinance and an obscure factual background." *BN v. Crow Tribe,* 940 F.2d at 1246. Furthermore, exhaustion will provide the benefits of tribal explanations and expertise to the court in the event of further judicial review. *Id.*

Plaintiffs raise two arguments regarding the purposes of exhaustion which must be addressed. First, Plaintiffs maintain that this case involves only issues of federal law and that no tribal expertise is required. This argument, however, is unavailing for two reasons. First, though Plaintiffs contend that they are susceptible to Tribal regulatory authority, the initial question as to whether the Plaintiffs' proposed projects are within the scope of Ordinance 87A has not been answered. Certainly, the Shoreline Protection Office is best suited to make this determination in the first instance. Second, the fact that issues of federal law are involved does not

diminish the benefits of exhaustion. The growing expertise of tribal courts need not be limited solely to the interpretation of internal laws and regulations. To the contrary, the continuous exposure of tribal courts to jurisdictional questions involving issues of federal law increases the value of their explanations to subsequent reviewing courts. Though exhaustion provides benefits to later reviewing courts, it also benefits tribal courts by encouraging them "to explain to the parties the precise basis for accepting jurisdiction." *National Farmers Union*, 471 U.S. at 857.

The second point raised by Plaintiffs concerning the purposes of exhaustion is based on prior administrative actions taken by the Tribes pursuant to Ordinance 87A. Because the Ordinance has been in effect for several years and has already been interpreted by the Shoreline Protection Board as a grant of authority over all lands within the exterior boundaries of the Reservation regardless of ownership, Plaintiffs suggest that exhaustion is unnecessary, and that this previous interpretation distinguishes this case from *BN v. Crow Tribe*.

In *BN v. Crow Tribe*, the Circuit Court noted that the Crow Tribe had not had an occasion to interpret the ordinance in question before the suit was filed in federal court. In this case, Ordinance 87A has been interpreted previously but only by the Shoreline Protection Board. The scope of Ordinance 87A has not been previously considered by the Tribal Court. Because both administrative and judicial remedies must be exhausted before proceeding in federal court, Plaintiffs' argument concerning prior administrative interpretation is unavailing. *BN v. Crow Tribe*, 940 F.2d at 1247.

Based on the foregoing, the court finds that all three imperatives for exhaustion compel dismissing or staying federal proceedings in this case.

National Farmers Union Exceptions

In *National Farmers Union,* the Supreme Court enumerated three exceptions to the tribal exhaustion doctrine. Exhaustion is not required in situations where the assertion of tribal jurisdiction (1) "is motivated by a desire to harass or is conducted in bad faith," or (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union,* 471 U.S. at 856, note 21. Plaintiffs argue that the latter two exceptions are applicable in this case.

Regarding the second exception, the court notes that Plaintiffs have expanded it to include actions which are patently violative *of the Constitution or* express jurisdictional prohibitions. By improperly adding the constitutional aspect to the exception, Plaintiffs attempt to engage the court in an analysis of their constitutional claims at the exhaustion stage. However, the court will not consider the merits of Plaintiffs' case at this stage of the proceedings.

As to the genuine exception, Plaintiffs cannot point to any action "patently violative of jurisdictional prohibitions." As was discussed above, this dispute is unquestionably a "reservation affair" and arises on the reservation. The Supreme Court has held that "tribal authority over the activities of nonIndians on reservation

lands is an important part of tribal sovereignty. (Citations omitted) Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual,* 480 U.S. at 18. Rather than patently violative of jurisdictional prohibitions, Tribal jurisdiction over Plaintiffs in this case "presumptively" lies with the Tribes pending a full examination of tribal sovereignty. Therefore, the second exception to the exhaustion requirement does not apply in this case.

Plaintiffs also contend that exhaustion would be futile because of a lack of an adequate opportunity to challenge the Tribal Court's jurisdiction. Plaintiffs' arguments in this regard include allegations that the Shoreline Protection Board and the Tribal Court have prejudged the issue, that they lack independence from the Tribal Council and the Tribal Legal Department, and that they are biased. However, arguments questioning the competency and neutrality of tribal courts have long been a mainstay in attacks on tribal jurisdiction by nonIndians and have been consistently rejected. *See, e.g. Iowa Mutual,* 480 U.S. 9 (1987); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Therefore, the court finds that the third exception to the exhaustion requirement also does not apply in this case.

Presence of Federal Defendants

Finally, Plaintiffs argue that exhaustion of tribal remedies is impossible in this case because the Tribal Court lacks jurisdiction over the Federal Defendants. Plaintiffs contend they cannot comply with the exhaustion requirement because they cannot file the identical

case in Tribal Court. Plaintiffs, however, have misconstrued the exhaustion requirement.

An order dismissing this action until the exhaustion requirement has been fulfilled is not a remand of the case to Tribal Court. This court cannot compel Plaintiffs to seek relief in Tribal Court but can only act according to the clear directives that have been given it by the United States Supreme Court and the Ninth Circuit Court of Appeals. Pursuant to those directives as enunciated in *National Farmers Union* and its progeny, Plaintiffs can proceed no further with this case in federal court until tribal remedies have been exhausted.

Compliance with the exhaustion requirement, however, does not demand the impossible of Plaintiffs as they suggest. Plaintiffs are not required to file a case in Tribal Court which includes the Federal Defendants. Plaintiffs may seek such relief in Tribal Court as is possible under the law and, once that is accomplished, may seek further relief in this court.

The issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action and could be presented in Tribal Court without the Federal Defendants. The exhaustion doctrine requires that a record be developed in tribal proceedings concerning the authority of the Tribal Council to promulgate and enforce Ordinance 87A. That issue is determinative of all of Plaintiffs' claims, including the correctness of the BIA's approval and subsequent funding of the Ordinance. Therefore, the necessary record could be developed in Tribal Court without the presence of the Federal Defendants.

CONCLUSION

Because this case arises on the Reservation, directly implicates Tribal governmental interests, and names Tribal officials as Defendants, it is a "reservation affair." Under such circumstances, tribal remedies must be exhausted prior to the exercise of federal jurisdiction unless the assertion of tribal jurisdiction falls within one of the *National Farmers Union* exceptions. *Crawford v. Genuine Parts*, 947 F.2d at 1408. As none of the exceptions apply in this case, the court must either dismiss the case or stay the proceedings pending exhaustion of tribal remedies. *Id.* at 1407. Therefore,

IT IS HEREBY ORDERED that Defendants' motions to dismiss for failure to exhaust tribal remedies are GRANTED. The case is DISMISSED without prejudice pending exhaustion of tribal remedies.

If Plaintiffs do not inform the court within sixty days of their intent to seek Tribal remedies, the court shall enter final judgment.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 11th day of February, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES DISTRICT COURT

MISSOULA DIVISION DISTRICT OF MONTANA

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

V.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manual Lujan, Jr., et al.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 91-155-M-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss for failure to exhaust tribal remedies having been granted, that plaintiff take nothing and the case is dismissed without prejudice pending exhaustion of tribal remedies.

March 11, 1993
Date

LOU ALEKSICH, JR.
Clerk

/s/ Barbara A. Fries
(By) Deputy Clerk

Jon Metropoulos
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

Plaintiffs,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manuel Lujan Jr.; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louie Adams, Hank Baylor, Tony Incashola,

Cause No. CV-91-155-M-CCL

COMPLAINT

(Filed NOV 6 1991)

John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Snyder, Jim Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Joseph Felsman,

Defendants.

INTRODUCTION

1. In this action, the Plaintiffs seek relief from the imposition of power by the government of the Confederated Salish and Kootenai Tribes in excess of its jurisdiction and in violation of the Plaintiffs' constitutional rights; and from the unconstitutional and illegal support and approval of such violations by officers and employees of the United States. The Plaintiffs are not tribal members. They have no right to vote in tribal elections, hold tribal office, sit on juries in tribal court, or act as a tribal judge. The U.S. Constitution guarantees Plaintiffs these and other rights, including full and equal participation in the government that regulates their activities and in the courts that enforce the laws under which

they live. The individual Plaintiffs own land in fee within the Flathead Reservation, and with the Joint Board of Control they wish to undertake work on that land. Tribal government asserts it has jurisdiction to regulate that work pursuant to tribal Ordinance 87A. The assertion of jurisdiction by the tribal government over these Plaintiffs and the approval and support of this illegal assertion by federal officers and employees violates the Plaintiffs' constitutional rights. Moreover, the assertion of authority by the tribal government over these Plaintiffs exceeds its jurisdiction and is, therefore, illegal and illegitimate.

JURISDICTION

2. This is a civil action for declaratory, injunctive and mandatory relief arising under the Constitution of the United States and the Treaty of Hellgate, entered July 16, 1855 by the United States and representatives of the tribes which now comprise the Confederated Salish and Kootenai Tribes. This Court has jurisdiction pursuant to 28 USC § 1331 and 28 USC § 1361. This court has authority to review the federal administrative actions at issue pursuant to 5 USC § 702. It has authority to grant the requested declaratory, injunctive and mandatory relief pursuant to 28 USC § 2201 and 5 USC § 706.

VENUE

3. Venue is appropriate in the United States District Court of Montana, Missoula Division, pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff Ross Middlemist is a rancher who owns 110 acres in fee in Sanders County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Confederated Salish and Kootenai Tribes (hereinafter "Tribes" or "CSKT.")

5. Plaintiff Middlemist is an irrigator served by the Flathead Irrigation and Power Project (hereinafter "FIPP"), and he is a constituent of the Joint Board of Control. Mr. Middlemist is also a Commissioner for the Jocko Irrigation District and a member of the Joint Board of Control.

6. Plaintiff Wayne W. Maughan is a farmer who owns 280 acres in fee in Lake County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Tribes.

7. Plaintiff Maughan is a constituent of the Joint Board of Control.

8. Plaintiff Flathead Joint Board of Control (hereinafter "JBC" or "Joint Board") is comprised of elected representatives of three Irrigation Districts, the Flathead, Mission, and Jocko Valley, served by the FIPP. The JBC was created pursuant to § 85-7-1601, Mont. Code Ann., et seq. Pursuant to § 85-7-1612, Mont. Code Ann., the JBC has the authority and power, *inter alia*, to institute and maintain any and all actions, including suits at law or in equity, to enforce, maintain, protect, or preserve any and all rights, privileges and immunities enjoyed by the Irrigation Districts and their respective members.

9. The federal Defendants are the Secretary of the United States Department of Interior, the Portland Area Director of the Bureau of Indian Affairs, and the Superintendent of the BIA Flathead Agency. These Defendants, or their predecessors, reviewed and approved tribal Ordinance 87A, or had the responsibility to do so, and continue to lend or facilitate financial and technical assistance for its implementation and enforcement. Hereafter, when mentioned separately from the remaining Defendants, these Defendants are denominated the "federal government Defendants".

10. The remaining Defendants are elected or appointed officials of tribal government or employees of tribal government responsible for adopting, implementing and enforcing tribal Ordinance 87A. Specifically, the elected officials are members of the Tribal Council of the CSKT, which adopted tribal Ordinance 87A. The named tribal government employees or appointees are members of the tribal Shoreline Protection Board, the administrator of the Shoreline Protection Office of the CSKT, and the Director of the tribal Department of Natural Resources, all of whom are charged with implementing and enforcing the Ordinance. Hereafter, when mentioned separately from the federal government Defendants, these Defendants are denominated the "tribal government Defendants".

FACTS

Ross Middlemist

11. Plaintiff Ross Middlemist represents the third generation in his family to farm and ranch on the

Flathead Reservation. He purchased the particular real property where the activities in question are to occur in 1974. The property is homesteaded land in the Dixon Bench area and it is included within the Jocko Irrigation District. It is in Sec. 13 and 14, T. 18 N., R. 22 W.

12. A small natural spring arises from the ground on the property, which Mr. Middlemist holds in fee. This spring runs for approximately 100 yards and disappears into the ground on Mr. Middlemist's property. Mr. Middlemist uses this spring water to supply a stockwater tank. This stockwater tank has become worn over the years and is in need of refurbishing or replacement.

13. Mr. Middlemist planned to improve the site and replace or refurbish the stockwater tank this fall. On September 17, 1991 he went to the Agricultural Stabilization Conservation Service ("ASCS") for Sanders County in Plains, Montana, to ask about financial assistance for this project. After an inspection by a Soil Conservation Service ("SCS") employee, he was told the project would likely qualify for funding.

14. On September 28, 1991 Mr. Middlemist received a letter from the ASCS which stated the project had been approved for funding in the amount of $1,000.00.

15. On October 8 and 9, Mr. Middlemist was informed by the SCS and the ASCS that, in addition to applying for permits for the project from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks, he would have to apply for a permit from the tribal Shoreline Protection Office pursuant to the provisions of tribal Ordinance 87A.

16. Mr. Middlemist stated that while he would apply for all applicable permits, he did not believe tribal Ordinance 87A was legally applicable to him. He was then informed by the ASCS this might impede approval of the project for funding.

17. On October 24, 1991, Mr. Middlemist was informed the ASCS would not provide funding for the project unless he obtained a tribal permit pursuant to Ordinance 87A. He was told the $1,000.00 funding would remain available to him for 30 days, allowing him to decide whether or not to apply for a tribal 87A permit.

18. Mr. Middlemist has not applied for a permit from the tribal Shoreline Protection Office.

19. Mr. Middlemist has done no construction on the project.

Wayne W. Maughan and Joint Board of Control

20. Plaintiff Wayne Maughan holds fee simple title to real property located in the NW 1/4 of Sec. 16, T. 20 N., R. 21 W., which is included within the Mission Irrigation District. He is a second-generation farmer in the area. His family first acquired the property in question by purchase from the State of Montana through a school section sale.

21. Mr. Maughan is an irrigator served by FIPP and represented by the Joint Board of Control.

22. Mr. Maughan has an impoundment reservoir on his property which is fed by a perennial stream, Maughan Creek, and which, along with the creek, drains farmland situated at higher elevations. The stream runs in a generally east-to-west direction.

23. The dam on Mr. Maughan's property requires improvement for safety and water quality reasons and to expand the capacity of the reservoir.

24. Improvement of this dam will improve the quality of water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows; and by allowing reuse of irrigation water. Additionally, by capturing more runoff and irrigation return flows and the reuse of that water, it will make more water available for upstream irrigators by requiring less water to be delivered to Mr. Maughan.

25. To facilitate this project, the Joint Board passed a resolution on November 13, 1990, numbered Resolution No. 90-04, and set aside a grant of $3,000.00 to help pay for the project.

26. This project will benefit the Joint Board and its constituents by improving water quality and the efficiency of water use and by enhancing irrigation capabilities and opportunities.

27. This project is part of a demonstration program for projects providing both water quality and irrigation benefits. Similar projects are anticipated on the lands of Joint Board constituents, including non-member-owned fee lands, to enhance irrigation opportunities, promote the efficient use of water, and improve water quality.

28. The Joint Board retained an engineering firm to inspect the dam and design and draft plans for its improvement. In the course of that work, the engineer

inspected the dam and consulted on the plans for improving the dam with the Montana State Department of Natural Resources and Conservation ("DNRC"), Dam Safety Section. The DNRC determined the dam is not a high-hazard dam and therefore the Joint Board and Mr. Maughan need not obtain either a construction or operating permit from DNRC.

29. Mr. Maughan and the Joint Board then began the process of applying for the requisite state, federal and local government permits and approvals. Specifically, the Joint Board and Mr. Maughan have begun the process of applying for or intend to apply for, when appropriate, the following permits:

(i) a "404 permit" from the Army Corps of Engineers;

(ii) a Montana Pollutant Discharge Elimination System ("MPDES") permit from the state Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES");

(iii) a "124" Stream Preservation Act permit from Montana State Department of Fish, Wildlife & Parks;

(iv) a "310", Natural Streambed and Land Preservation Act permit from the Lake County Soil Conservation District;

(v) a "3A" permit related to a short-term turbidity variance during construction, from the DHES;

(vi) a flood plain development permit from the DNRC.

30. The Army Corp of Engineers informed the Joint Board of Control the tribal Shoreline Protection Office, pursuant to tribal Ordinance 87A, would have to review the project.

31. Neither the Joint Board nor Mr. Maughan have applied for a permit from the tribal Shoreline Protection Office.

32. Neither the Joint Board nor Mr. Maughan have done any construction on the project.

Tribal Ordinance 87A

33. The Aquatic Lands Conservation Ordinance ("ALCO"), designated tribal Ordinance No. 87A, was adopted by the Tribal Council on December 13, 1985. By its terms, it became effective upon the promulgation of implementing regulations by the Tribal Council on December 5, 1986.

34. By its terms, Ordinance 87A purportedly applies throughout the Flathead Indian Reservation regardless of whether the person who intends to engage in a project within the definition of ALCO is a tribal member or not, or whether or not the project is to be carried out on land owned in fee by a nonmember.

35. The federal government defendants or their agents or employees, or some of them, provided technical and financial assistance to the tribal government defendants for the development of Ordinance 87A.

36. The federal government defendants or their agents or employees, or some of them, provide technical

and financial assistance to tribal government for the implementation and enforcement of Ordinance 87A.

37. The Secretary of the Interior, or a subordinate to whom he delegated the authority, approved Ordinance 87A.

38. The Shoreline Protection Office ("SPO"), which administers and enforces Ordinance 87A, is part of tribal government. It is an office within the tribal government's Department of Natural Resources.

39. J. Lloyd Jackson is the administrator of the SPO.

40. Rhonda R. Swaney is the Director of the Department of Natural Resources.

41. The SPO has advertised by radio and newspaper that Ordinance 87A is applicable throughout the reservation and anyone planning to do any work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation must adhere to its provisions.

42. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO prior to doing any work on the project.

43. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO for a determination of whether or not the planned project falls within the scope of its provisions.

44. Ordinance 87A requires each applicant to pay a nonrefundable fee.

45. Tribal government, through the SPO and the Shoreline Protection Board, enforces Ordinance 87A and would enforce its provisions against the Plaintiffs if they proceed with their projects without following the requirements of Ordinance 87A.

46. Ordinance 87A provides that any person engaging in a project without a valid 87A permit shall be subject to proceedings in tribal court for abatement and a penalty of up to $500.00 for each day the project is deemed in violation. The tribal court, pursuant to 87A, may also order a violator "to restore at his own expense the damaged lands and waters. . . . "

The Flathead Reservation

47. The Treaty of Hellgate signed July 16, 1855 by representatives of the United States and the Flathead Nation, the Upper Pend d'Oreilles, and the Kootenais provided for the reservation to these Indian Tribes of the land now within the exterior boundaries of the Flathead Indian Reservation.

48. The Reservation encompasses approximately 1.2 million acres of land in northwest Montana. Approximately 50% of the Reservation area is owned by individuals in fee. Of this amount, the majority is owned by individuals who are not members of the CSKT.

49. Of the remaining Reservation acreage, the federal government owns approximately 22,000 acres; and the State of Montana owns approximately 30,000 acres.

50. The remainder of the Reservation is either held in trust by the United States for the Tribes or individual tribal members or owned by the Tribes.

51. The majority of tribal and trust lands is situated along the periphery of the Reservation and along the Flathead River corridor. The valleys of the Reservation are largely owned in fee by nonmembers of the Tribes.

52. Article two of the Treaty of Hellgate provided that the Reservation was to be "for the use and occupation" of the Tribes "and as a general Indian reservation . . . " Article two also provided the reservation was to be "for the exclusive use and benefit" of the Tribes, and that no "white man, excepting those in the employment of the Indian Department (shall) be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent."

53. Article six provided that the President may in his discretion cause the whole or a portion of the reservation to be surveyed and allotted to individuals or families of the Tribes, citing as providing the terms and regulations for the location of individuals or families on allotments the sixth article of the treaty with the Omahas.

54. In Article eight of the Treaty, the Tribes acknowledged "their dependence upon the Government of the United States. . . . "

55. Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 USC §§ 331 et seq., in 1887, the policy of which was to effect the gradual assimilation of

the Indian population and the gradual extinction of Indian reservations and Indian titles.

56. Toward this end, Congress provided in the General Allotment Act for the allotment of reservation lands to tribal members, the eventual removal of restrictions on alienation of such allotments, and the opening of unallotted reservation lands to non-members for settlement.

57. Pursuant to this policy, Congress, by the Act of April 23, 1904 (33 Stat. 302), provided for the survey and allotment of the Flathead Reservation to persons having tribal rights and the subsequent disposal of unallotted lands to nonmembers pursuant to the requirements of the Act.

58. Pursuant to these Acts of Congress and Presidential Proclamations issued under their provisions and through alienation of lands allotted to tribal members, nonmembers of the Tribes have come to own the majority of fee land on the Reservation.

59. The Reservation forms a portion of three counties, those being Missoula County, Sanders County, and Lake County.

60. The entire Reservation population according to the latest U.S. census figures is 21,259. Of this amount, 3,000, or 14% are tribal members. Thus, 86% of the Reservation population is comprised of nonmembers of the Tribes.

61. Nonmembers are excluded from entering certain areas of the Reservation by tribal government.

62. Federal, state, and local governmental agencies exercise regulatory jurisdiction over various activities

and occurrences on the Reservation, including the activities in question here which the Plaintiffs wish to undertake.

63. Tribal government exercises the inherent sovereign power of the Tribes and it is not a local government deriving its authority from the sovereignty of the state or federal governments.

64. Non-members are excluded from receiving or utilizing certain services provided by tribal government.

65. In its governmental capacity, the federal government cannot exclude any nonmember from entering the Reservation.

66. In its governmental capacity, the federal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

67. In its governmental capacity, the federal government can neither prohibit nor condition the activities of the Joint Board.

68. In its governmental capacity, the tribal government cannot exclude any nonmember from entering the Reservation.

69. In its governmental capacity, the tribal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

70. In its governmental capacity, the tribal government can neither prohibit nor condition the activities of the Joint Board.

71. Nonmembers may not serve on juries in tribal court, hold elective office within tribal government, serve as a tribal judge, or vote in tribal government elections.

72. The U.S. Constitution guarantees citizens the fundamental right to vote for and have an equal voice in the election of the government under which they live. The U.S. Constitution guarantees citizens the fundamental right to run for and hold elective office in the government under which they live. The U.S. Constitution guarantees citizens the right to a jury trial by their peers in civil cases where the common law provides such right. The U.S. Constitution guarantees citizens an equal right to serve as jurors in civil cases. The U.S. Constitution requires the United States to guarantee to each state a republican form of government, the benefits of which inure to the citizens of the states. The U.S. Constitution guarantees the Plaintiffs these and other rights notwithstanding their residence within the exterior boundaries of the Flathead Reservation.

Count One

73. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

74. The assertion of authority by the tribal government Defendants pursuant to tribal Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inconsistent with the Tribes' status as a dependent sovereign incorporated within the United States and subject, in its external relations, to the Constitution.

75. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Two

76. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

77. The assertion of authority by the tribal government Defendants pursuant to Ordinance 87A over the activity of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inimical to the overriding federal interest and obligation to provide, guarantee and ensure a republican form of government.

78. The exercise of tribal government power pursuant to Ordinance 87A injures the Plaintiffs by depriving them of their right to live under a republican form of government as guaranteed by the Constitution.

Count Three

79. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

80. The assertion of authority by the tribal government defendants pursuant to Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of their sovereignty and therefore their jurisdiction as it is inimical to the overriding federal interest and obligation to provide and safeguard civil liberties and rights guaranteed by the Constitution of the United States.

81. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Four

82. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

83. The Reservation areas in which the Plaintiffs have planned projects on aquatic lands are self-contained, definable areas in which non-tribal fee lands predominate. Tribal government has no significant interest in controlling these activities, and the Tribes therefore lack jurisdiction to apply and enforce Ordinance 87A.

84. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs

by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Five

85. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

86. The Secretary of Interior and his agents have the duty to refrain from acts violating the Constitution and the rights it secures to all citizens. The Secretary of Interior and his agents have the duty, when it is within their legal powers, to prohibit, prevent, and rectify violations by the tribal government of the Constitution and the rights secured to all citizens.

87. The Secretary of Interior and his agents, having approved and reviewed and failed to disapprove or modify tribal Ordinance 87A, aided, abetted, encouraged and failed to prohibit or restrain the violation by the tribal government of constitutional rights of the Plaintiffs. By approving Ordinance 87A, the Secretary of the Interior and his agents acted illegally, unconstitutionally and, therefore, beyond the scope of their powers, since their actions approved an ordinance violative of the Plaintiffs' constitutional rights.

Count Six

88. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

89. The federal government, through the Department of Interior, Bureau of Indian Affairs, provides funding and technical assistance used in the implementation and enforcement of Ordinance 87A. The federal government, through the Department of Interior, Bureau of Indian Affairs, provided funding and technical assistance used in the development of Ordinance 87A.

90. By providing funding and technical assistance for the development, implementation and enforcement of Ordinance 87A, the Secretary of Interior and his agents acted and continue to act unconstitutionally and illegally and, therefore, beyond the scope of their powers, since their actions supported and continue to support an Ordinance violative of the Plaintiffs' constitutional rights.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request this court to grant the following relief:

1. A declaratory judgment that tribal government lacks the jurisdiction to apply and enforce the provisions of tribal Ordinance 87A against the Plaintiffs.

2. A permanent injunction enjoining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs.

3. Upon motion of the Plaintiffs and after hearing set by the court, a preliminary injunction, restraining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs until this matter can be fully litigated.

4. Relief in the nature of mandamus requiring the federal government defendants to disapprove tribal Ordinance 87A insofar as it purports to apply to nonmember activity on nonmember-owned land.

5. Relief in the nature of mandamus requiring the federal government defendants to withdraw technical and financial assistance for the implementation of tribal Ordinance 87A insofar as that technical and financial assistance supports, aids and encourages the imposition of tribal government power beyond its jurisdiction and in violation of the Plaintiffs' Constitutional rights.

6. Such other relief as the court deems just and proper.

DATED this 6th day of November, 1991.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: Jon Metropoulos
Jon Metropoulos
139 North Last Chance Gulch
P. O. Box 1697
Helena, Montana 59624-1697
(406) 449-6220
Attorneys for Plaintiffs

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

* * *

PART IV

PERMITS

Section 1. Permit Required

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

* * *

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

* * *

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized agen~~y~~[t (as handwritten in original)] may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars

for each day that the responsible person continues to engage in or maintains a nonconforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

* * *

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985, with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (l), (n), (t) and (u) of the Tribes Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James H. Steele
Vice-Chairman,
Tribal Council

ATTEST:

/s/ Illegible
Executive Secretary

APPROVAL:

_____
Title_____
Bureau of Indian Affairs

Date:_____

APPROVED:
/s/ Donovan R. Boldt
SUPERINTENDENT
Received Office of
Superintendent

Dated DEC 16 1985

FINAL REGULATIONS FOR THE AQUATIC LANDS CONSERVATION ORDINANCE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

(December 5, 1986)

* * *

Section 1.1 Authority.

These regulations are adopted under authority of Ordinance 87A of the Confederated Salish and Kootenai Tribes, the Aquatic Lands Conservation Ordinance.

* * *

PART V

ENFORCEMENT

Section 5.1 Violations.

The following actions shall constitute an act of non-compliance with these regulations and Ordinance 87A:

(1) commencement or initiation of a project without the responsible person first obtaining a permit; or

(2) continuation of work on an unpermitted project by any person; or

(3) failure to comply with the terms or conditions of a permit; or

(4) failure to comply with the terms and conditions of Ordinance 87A and these regulations; or

(5) failure to comply with orders of the Board.

* * *

Section 5.5 Penalties.

Upon a finding that the person served with a Notice of Non-Compliance has committed a violation of Ordinance 87A, these regulations, a condition of a permit, or an order of the Board, any or all of the following penalties may be assessed and ordered:

(1) revocation of an applicable permit;

(2) removal of the project and restoration of the underlying property;

(3) imposition of a monetary fine;

(4) prescription of remedial measures.

Section 5.6 Actions to Enforce.

The Administrator may institute in Tribal Court, under the procedures there applicable, a civil action to collect against any person who has been ordered to pay a penalty or perform remedial measures pursuant to these regulations and who has not appealed such decision or who has not paid an assessed fee, costs, or penalty.

Section 5.7 Revocation of Permit and Restoration of Permit Area.

(a) In addition to revocation of a permit the responsible person may be ordered to remove a project and to restore the area surrounding and underlying the project.

(b) Removal of a project and restoration of the surrounding area must be accomplished within sixty (60) days of of [sic] an order directing such action, except that the Board or Court may, on its own initiative, or upon

application of the responsible person, delay the removal and restoration for up to twelve months if it is determined that such delay would reduce the likelihood of environmental damage resulting from such removal and restoration.

Section 5.8 Failure to Comply With an Order to Remove.

(a) In the event that a person responsible for a project fails to comply with an order directing removal and restoration, the Board, after the lapse of a sixty-day grace period, may undertake the removal of the project and restoration of the underlying property on its own initiative, and may assess the responsible person for the costs of such work.

(b) The Administrator must notify the responsible person by mail at least five (5) days in advance of the planned enforcement action that it plans to remove the project and perform any necessary restoration.

Section 5.9 Fines.

(a) Any person responsible for a project constructed or maintained contrary to the provisions of Ordinance 87A, these regulations, or the terms of a permit shall be subject to a penalty of not less than twenty-five dollars ($25) or more than five hundred dollars ($500) for each act of non-compliance.

(b) Each day during which an act of non-compliance shall continue shall be considered a separate violation of these regulations and of Ordinance 87A.

(c) Nothing in these regulations will be interpreted to deny the use of other civil remedies available under Tribal or federal law.

* * *

The Confederated Salish and Kootenai Tribes
of the Flathead Reservation

SHORELINE PROTECTION OFFICE

Box 278
Pablo, Montana 59855
(406)675-2700
Ext. 368

Conf S+K Tribes
5/4-12/31/89
#210

NOTICE

Private individuals; Corporations, Local, County, State, Tribal and Federal Government Agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation **must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.**

This regulation is in accordance with Tribal Ordinances 87A, the Aquatic Lands Conservation Ordinance and 64A (revised), the Shoreline Protection Ordinance.

These ordinances represent the effort of the Confederated Salish & Kootenai Tribes to maintain the vital link between land and water for present and future generations. The economic well-being and quality of life for everyone living on the Flathead Reservation is largely dependent upon the reservations' wealth of natural resources and how they are managed.

Applications may be acquired by calling (406) 675-2700, extension 368, or by picking one up at the Shoreline Protection Office in the Tribal Complex at Pablo.

Reservation Waters Need Your PLEASE Keep Them Clean

PLAINTIFF'S EXHIBIT
D

BEST AVAILABLE COPY

UNITED STATES CONSTITUTION

ARTICLE IV

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

TREATY WITH THE FLATHEADS, ETC., 1855.

July 16, 1855. *Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them.*

* * *

ARTICLE 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

* * *

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to

reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent.

* * *

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais. Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

* * *

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said

lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided,* That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President. . . .

* * *

28 USCS § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

---

28 USCS § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch 646, § 1, 62 Stat. 964.)

No. 92-1757

Supreme Court, U.S.
FILED
MAY 27 1993

In The

Supreme Court of the United States

October Term, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louis Adams, Hank Baylor, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

Respondents.

On Petition For Writ Of Certioari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a petition for certiorari pursuant to Supreme Court Rule 11 should be denied because Petitioners chose not to exhaust Tribal remedies, in contradiction to this Court's express rule to the contrary expressed in *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985).

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No. 92-1757

In The

Supreme Court of the United States

October Term, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louis Adams, Hank Baylor, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

Respondents.

On Petition For Writ Of Certioari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The unreported District Court decision dismissing this action is printed in Petitioner's Appendix at A-1 through A-15. Petitioner filed a notice of appeal to the Ninth Circuit Court of Appeals on March 3, 1993. Tribal Appellees filed a motion for summary affirmance to the Ninth Circuit on April 30, 1993. On May 3, 1993, Tribal Respondents received the petition for Writ of Certiorari. Petitioners filed a motion to stay the Ninth Circuit appeal on May 7, 1993. The Ninth Circuit denied Petitioner's motion to stay, as well as the Tribal motion for affirmance, by Order dated May 17, 1993. (Appendix p. 1, hereafter "App.")

STATEMENT OF THE CASE

This case involves the extraordinary efforts of Petitioners (collectively referred to as "JBC") to circumvent established appellate practice. They challenge the validity of the exercise by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (hereafter "Tribes") of civil jurisdiction regulating an aspect of the Reservation environment as that law effects the activities of non-Indians. The Tribal law in question is the Aquatic Lands Conservation Ordinance ("ALCO"), App. 2-13, a civil regulatory ordinance "designed to effectuate the Tribal and federal goals of protecting the quality of Reservation aquatic habitat" upon which the Tribes' treaty-reserved fish and wildlife resources depend. (Petitioner's Appendix A-2; App. 14 (Treaty of Hellgate, July 16, 1855, 12 Stat. 975, Article III.) *See also, Confederated Salish and*

Kootenai Tribes v. Namen, 665 F.2d 951, 964-965 (9th Cir. 1982), *cert. denied*, 486 U.S. 1007 (1988) ("*Namen*"); *Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).[1]

ALCO establishes administrative permitting processes for persons who wish to engage in activities that have the potential to impact adversely Reservation aquatic lands. Proposed projects are reviewed by an interdisciplinary team of professionals in fisheries, wildlife, hydrology, engineering, and other appropriate disciplines. Only after that review is conducted can the determination be made by the SPB whether ALCO applies to a proposed undertaking, and if so, whether to approve, approve with modification, or deny a project. Since implementation in 1987, hundreds of private, state, federal and Tribal undertakings have been processed under ALCO.

Of note, ALCO establishes Tribal administrative and judicial review process for all persons who either

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[1] After the Secretary of Interior approved ALCO in accordance with the Tribes' Constitution, the Tribes solicited region-wide public comment and held a public hearing on proposed implementing regulations, as required under the Tribal Administrative Procedures Ordinance, another Secretarily-approved Tribal law. (Petitioner's Appendix A-2). ALCO is administered by the Shoreline Protection Board ("SPB") recognized in *Namen, supra*, as possessing civil jurisdiction over Indians and non-Indians on the Flathead Indian Reservation. In keeping with the Tribes' practice, the SPB, a Tribal governmental agency, is comprised of Indians and non-Indians, including a state municipal court judge.

allegedly violate ALCO or feel aggrieved by a decision of the SPB. (App. 10-11). JBC ignored completely the Tribal processes.

SUMMARY OF ARGUMENT

The JBC attempts to evade the rule of exhaustion of Tribal remedies enunciated in *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) ("*National Farmers*") and perfected in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) ("*Iowa Mutual*").[2] These cases set a rule that "civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by specific treaty provisions or federal statutes." *Iowa Mutual* at 18 (emphasis added). Instead, JBC chose to circumvent the exhaustion rule by filing for declaratory relief in federal district court, claiming Tribal jurisdiction to be "patently unconstitutional and violative of the limits of tribal jurisdiction established by this Court's decisions." (Petition, p. 11). The appropriate Tribal administrative and judicial forums were, therefore, deprived of the opportunity to interpret and apply Tribal law to the facts in this case. Providing a Tribal court the "full opportunity to determine its own jurisdiction" is one of the central reasons this Court has directed that exhaustion occur prior to attempting federal

[2] The rule of law from this Court, and as applied by the Ninth Circuit, addresses *exhaustion* of Tribal remedies. Accordingly, the JBC misleads when it suggests that this is an abstention case.

court review. *Iowa Mutual* at 16, 18; *National Farmers* at 857.[3]

The Tribes and the United States moved for dismissal under Rule 12b(6) of the Federal Rules of Civil Procedure for failure to exhaust Tribal remedies, as well as on issues of ripeness, standing, capacity to sue, and sovereign immunity. The district court granted the motion and issued a well-reasoned opinion applying this Court's exhaustion rule.[4] JBC filed a notice of appeal to the Ninth Circuit Court of Appeals. However, rather than perfect that appeal and enable the Ninth Circuit to review the

---

[3] In *National Farmers*, petitioners sought to defeat Tribal exhaustion by asserting that 28 U.S.C. § 1331 afforded a basis for federal jurisdiction independent of the exhaustion requirement. In *Iowa Mutual*, the same argument was based on 28 U.S.C. § 1332. In each case this Court refused to accept that end run, reasoning that

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." (quoting *National Farmers*)

Iowa Mutual, p. 16.
The JBC argues that 28 U.S.C. § 2201 provides an independent Congressional exception to exhaustion (Petition, p. 23). That argument fails under the reasoning quoted above.

[4] The Ninth Circuit has repeatedly applied the rule and exceptions in *National Farmers* and *Iowa Mutual* and is the proper forum to resolve this case under normal appellate practice. *See, Burlington Northern Railroad v. Crow Tribal Council*, 924 F.2d 899 (9th Cir. 1991); *Crawford v. Genuine Parts*, 947 F.2d 1405 (9th Cir. 1991); *Stock West v. Taylor*, 942 F.2d 655 (9th Cir. 1991) aff'd in part and vacated in part 964 F.2d 912 (9th Cir. 1991); *FMC v. Shoshone-Bannock Tribe*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1404 (1991).

district court decision and consider other grounds for dismissal, if necessary, JBC has taken this extreme approach of attempting to circumvent the Ninth Circuit as well as the Tribal forums.

JBC would have this Court believe that this case satisfies the provisions of Supreme Court Rule 11, and does so with a citation to the progeny of *Brown v. Board of Education*, 347 U.S. 403 (1954). (Petition, p. 14). The effort to elevate their complaint to the level of "imperative public importance" found in *Brown* is fatuous and unavailing.

The District Court decision comports with the United States Constitution and decisions of this Court. JBC's efforts to elevate their allegations of impaired Constitutional rights to the "imperative public importance" required under Rule 11 pales in comparison to the overwhelming federal governmental policy to support Tribal self-government and Tribal self-determination that form the basis for exhaustion in *National Farmers* and *Iowa Mutual*. This case does not satisfy the Rule 11 requirement of such importance as to mandate immediate settlement in this Court.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS CORRECT AND ADDRESSES NO ISSUE OF IMPERATIVE PUBLIC IMPORTANCE SUFFICIENT TO REQUIRE IMMEDIATE SETTLEMENT IN THIS COURT

1. This Case Does Not Satisfy The Requirements of Rule 11.

The JBC assert that ALCO is "patently unconstitutional and violative of the limits of tribal jurisdiction established by this Court's decisions." (Petition, p. 11). They assert that this conclusory remark satisfies the requirements of Rule 11. Rule 11 provides an extraordinary avenue to bypass established appellate practice in exceptional circumstances. No challenge to Tribal jurisdiction has satisfied the requirements of Rule 11. The Rule is used sparingly and only when issues of national significance mandate an immediate, prejudgment writ. *See, Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President Truman ordered federal takeover of the Nation's steel mills to avoid jeopardizing the national defense); *United States v. United Mine Workers*, 330 U.S. 258 (1947) (the United States sued to block a strike that effectively halted bituminous coal production nationwide); *Brown v. Board of Education*, 344 U.S. 1, 141, 891 (1952); 347 U.S. 482 (1954) (nationwide desegregation of public schools); *United States v. Nixon*, 418 U.S. 683 (1974) (a claim of Presidential privilege as a defense to a court order to divulge the Watergate tapes).

The *Nixon* opinion is demonstrative of the high threshold necessary to satisfy Rule 11. A Rule 11 petitioner must demonstrate that its claim falls within the

"limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Nixon* at 691 (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)). There is, of course, no such immediacy or exigency here. There is no national defense issue at stake. An entire industry has not gone on strike. A President is not threatened with impeachment. Rather, several Reservation farmers simply do not like Tribal jurisdiction over "reservation affairs" (as that term is used in *Iowa Mutual* at 15, and *Stock West v. Taylor, supra* at 661) and do not want to follow the rule of exhaustion in *National Farmers* and *Iowa Mutual*.

In a deceptive string cite, devoid of legal analysis, the JBC attempts to cloak its petition in the progeny of *Brown v. Board of Education, supra*. The effort fails for many reasons, including, (1) the fact that in *Brown* the actions of state government allowing racial segregation of public facilities were challenged under the Fourteenth Amendment, (2) *Brown* was the focal point of a large number of related challenges to a suspect classification based upon race from throughout the Nation then pending before the Court, (3) reams of findings, studies and analysis of the challenged actions were available to the Court, and (4) the Court's finding that "education is perhaps the most important function of state and local governments" (344 U.S. at 493) clearly recognized the "imperative public

importance" of that issue to the nation.[5] No such imperative exists. Established trial and appellate practice will allow full review of the claims.

2. Tribal Jurisdiction Is Not Patently Violative Of Any Portion Of The Constitution.

As this Court has noted, "Indian Tribes occupy a unique status under our law." *National Farmers* at 851. For example, the Bill of Rights does not apply to the actions of tribal government, though the analogous protections contained in the Indian Civil Rights Act (25 U.S.C. 1301 *et seq.*) do apply. *Santa Clara Pueblo v. Martinez*, 436 U.S. 349 (1978). It is JBC's refusal to accept this fact of life that gives rise to their allegations of Constitutional infirmity here. They allege that ALCO deprives them of a Constitutional right to full and equal participation in tribal government and of civil rights and liberties, as well as the right to republican form of government.

Tribal civil jurisdiction over non-Indians is not per se a violation of these rights. *United States v. Mazurie*, 419 U.S. 544 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981); *Namen*, at 964 n.31. Furthermore, claims founded upon the guarantee of a republican form of government (which applies to states, not tribes), present

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[5] JBC also attempts to invoke Rule 11 at footnote 14 on page 14 of the Petition, with a similar string cite to cases interpreting challenges to Acts of Congress. The JBC petition challenges this Court's exhaustion rule and Tribal law, not an Act of Congress.

no justiciable question. *Baker v. Carr,* 369 U.S. 186, 224 (1962).

3. Because The JBC Has Prosecuted The Case In Such A Manner As To Preclude Any Forum From Making Findings Of Fact Or Conclusions Of Law, It Is Not Possible To Ascertain The Jurisdictional Limits Of ALCO.

Tribal forums should be afforded "the first opportunity to evaluate the factual and legal basis for the challenge" to their jurisdiction, (*Iowa Mutual* at 16) for "Tribal Courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." (*Iowa Mutual* at 14-15). Furthermore, "tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16.[6]

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[6] To be sure, this Court has structured three exceptions to the requirement that the JBC must exhaust Tribal remedies prior to seeking federal court review. They may be invoked only when the exercise of Tribal jurisdiction is:

> motivated by a desire to harass or is conducted in bad faith, . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers, p. 856 note 21.

JBC did not raise the first exception. It materially misrepresented the second exception, as noted by the District Court (Petitioner's Appendix A-12), yet still failed to satisfy it. Furthermore, JBC asserted unsubstantiated allegations of bias against Tribal administrative and judicial institutions and individuals in an unsuccessful effort to invoke the third exception; an act condemned by this Court when it "rejected similar

The Tribal law at issue provides protection to the habitat upon which treaty-reserved fish and wildlife resources depend (*Namen, supra,* at 964; *Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, supra*), protects the health and welfare of the Reservation population (*United States v. Montana,* 450 U.S. 544, 565-566 (1981)), and upholds the political integrity of the Tribal government (*Id.*). The jointly held Tribal and federal interests that control this matter are the federal policy of upholding and supporting Tribal self-governance and Tribal self-determination, as well as, the right of the Tribes to make their own laws for reservation affairs. *Williams v. Lee,* 358 U.S. 217, 220 (1959). The JBC interest lies in its perception that any exercise of Tribal civil jurisdiction over them is unlawful.

The JBC challenge has deprived the SPB and the trial and appellate Courts of the Confederated Salish and Kootenai Tribes of the opportunity to rule on the scope of ALCO. As this Court has stated:

> the existence and extent of a tribal court's jurisdiction will require a *careful* examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a *detailed* study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

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attacks on Tribal Court jurisdiction in the past." (*Iowa Mutual,* p. 19.) The District Court also condemned the JBC for this feeble effort to invoke the third exception. (Petitioner's Appendix A-13).

> We believe that examination should be conducted in the first instance in the Tribal Court itself.

National Farmers, pp. 855-856 (footnote omitted, emphasis added).

JBC asserts that as a matter of established Supreme Court authority, there is a per se rule that ALCO is unlawful, therefore exhaustion is inapplicable. They rely heavily upon the rulings in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), asserting that those decisions "cannot be distinguished on any principled basis. They control the issue and clearly state that in the factual situation presented here, the Tribal government has no jurisdiction."[7] Petition, pp. 20-21.

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[7] As noted above, there have been *no* administrative or judicial findings of fact. The JBC asserts many unproven and contested facts in its petition. For example, in an effort to bring into play the concepts discussed in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the JBC asserts that the lands at issue are in an "open reservation" (Petition, p. i), that the lands at issue are in "completely agricultural areas of the reservation" (Petition, pp. 5-6), that 400,000 or more individuals nationwide are similarly deprived of Constitutional rights and "all other civil liberties" by the existence of ALCO on the Flathead Indian Reservation (Petition, p. 13), that the Tribes "punish land use by people who are not tribal members" (Petition, p. 3), numerous allegations regarding the Reservation population and land status, and that the Maughan project "will improve water quality" and related allegations (Petition, p. 8 note 7), as well as the broad spectrum of allegations in the Complaint.

Oliphant, Wheeler, and *Duro* address Tribal criminal jurisdiction over non-members or non-Indians. This Court has repeatedly distinguished criminal cases from challenges to Tribal civil jurisdiction on two principled reasons. First, should the Court "apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions" involving Tribal and non-Indian disputes arising on the reservation. *National Farmers,* p. 854 (emphasis in original). The second principle distinction lies in the fact that Congress divested Tribes of aspects of criminal jurisdiction over non-Indians, but "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *Id.* at 854 (footnote omitted). Accordingly, a Tribal assertion of civil authority "is not automatically foreclosed, as an extension of *Oliphant* would require." *Id.* at 855 (footnote omitted); *accord. Iowa Mutual,* 9, 15.

The JBC also relies upon several decisions of this Court dealing with Tribal civil jurisdiction to support its allegation that ALCO is "patently unlawful". The cases cited do not establish a per se rule. Rather, the JBC's central case, *Montana v. United States,* 450 U.S. 544 (1981) establishes a general rule that Tribes may have lost certain aspects of civil jurisdiction over non-Indians on fee status reservations lands, but also established several

clear exceptions to the general rule. *Id.* at 565-566.[8] The JBC petition is premature.

> Until petitioners have exhausted the remedies available to them in the Tribal Court system, . . . , it would be premature for a federal court to consider any relief. Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by a District Court.

National Farmers, at 857.

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[8] *Montana* predated the development of the Tribal exhaustion doctrine, which was, therefore, not an issue. Unlike the present case, the *Montana* Court was asked to decide the challenge to tribal jurisdiction over non-Indians on fee lands *after* an extensive trial that produced large volumes of evidence, findings of fact, and conclusions of law, followed by appellate proceedings before the Ninth Circuit.

The JBC also asserts the pending case of *State of South Dakota v. Bourland,* No. 91-2051 (U.S. Sup. Ct. argued March 2, 1993) is germane. They are wrong for two reasons. First, exhaustion of Tribal remedies was not an issue in *Bourland,* but is the central issue in this case. Second, the focus of *Bourland* is the effect of two Congressional acts, specifically limited to the Cheyenne River Sioux Reservation, on tribal regulatory authority over fish and game on Tribal lands taken by the federal government for flood control purposes. *South Dakota v. Bourland,* 949 F.2d 984 (8th Cir. 1991).

CONCLUSION

For the foregoing reasons, the Confederated Salish and Kootenai Tribes respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals from the Ninth Circuit be denied.

Dated this 27th day of May, 1993.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSS MIDDLEMIST, et al., Plaintiffs-Appellants, vs. THE SECRETARY OF THE INTERIOR, Bruce Babbitt, et al., Defendants-Appellees.	)	No. 93-35315 DC# CV-91-155-CCL Montana (Missoula) ORDER (Filed May 17, 1993)

Before: WIGGINS and THOMPSON, Circuit Judges

Appelles' motion for summary affirmance is denied. *See United States v. Harris*, 846 F.2d 50 (9th Cir. 1988) (motion for summary affirmance should be made only after appellants' opening brief has been filed). Appellants' motion for stay of appellate proceedings is denied. The April 2, 1993 briefing schedule remains in effect.

(seal)

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title.

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

PART II

FINDINGS AND POLICY

Section 1. Findings.

The Tribal Council finds that:

a. The self-governing capabilities, political integrity, health and welfare, and economic security of the Tribes will be protected and enhanced by Tribal governmental control, regulation and protection of aquatic lands which are critical for the perpetuation of Reservation fisheries

and wildlife, the preservation of Reservation water quality, and the maintenance of the health, safety and welfare of Tribal members and thereby of all persons residing on the Reservation.

b. The Treaty of Hellgate July 16, 1855 (12 Stat. 975) reserved to the Confederated Salish and Kootenai Tribes (hereinafter the "Tribes") the exclusive right to hunt and take fish within the exterior boundaries of the Flathead Reservation. The exclusive Treaty right to hunt and fish within the Reservation confers upon the Tribes the right, duty and responsibility to protect those Tribal interests.

c. Reservation population growth and increased unregulated utilization of aquatic lands are causing adverse impacts upon the quality of Reservation waters, fisheries and wildlife habitat, and therefore, there exists an immediate need to regulate and manage the use of aquatic lands to preserve and protect them.

Section 2. Policy.

It is the policy of the Tribal Council to prevent the degradation of Reservation waters and aquatic lands by regulating construction or installation of projects upon aquatic lands whenever such project may cause erosion, sedimentation, or other distrubances [sic] adversely affecting the quality of Reservation waters and aquatic lands.

PART III

GENERAL PROVISIONS

Section 1. Definitions.

For the purposes of this Ordinance the following definitions will apply:

a. "Adjacent" means bordering, contiguous or neighboring. Wetlands separated from other Reservation waters by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands."

b. "Administrator" means the chief executive officer of the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

c. "Aquatic Lands" means all land below the mean annual high water mark of a Reservation water body.

d. "Board" means the Shoreline Protection Board of the Confederated Salish and Kootenai Tribes.

e. "Discharge of dredged material" means any addition or placement of dredged materials into Reservation waters or on aquatic lands whether through direct placement, or by secondary means such as run-off, slumping or overflow from a disposal site.

f. "Discharge of fill material" means any addition or placement of fill materials into Reservation waters or onto aquatic lands.

g. "Dredged material" means material that is excavated, displaced, or removed from aquatic lands.

h. "Fill material" means any material used for the purpose of replacing Reservation waters with dry land or dredged material.

i. "Mean Annual High Water Mark" means that line on the shore of Reservation waters established by the

fluctuations of water and indicated by physical characteristics such as a clear, naturally occurring line impressed on the bank; shelving changes in the character of soil; paucity or lack of terrestrial vegetation; or the presence of water borne litter or debris.

j. "Office" means the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

k. "Person" means any individual, partnership, association, corporation, and any other entity composed of individuals, and governmental entities.

l. "Project" means a physical alteration of aquatic lands, wetlands, or Reservation waters, not otherwise exempted by this Ordinance or implementing regulations, which has the potential to cause a material change in the condition of such lands or water in contravention of the policy of this Ordinance, and includes but is not limited to dredging, filling, unregulated access detrimental to aquatic lands, irrigation diversions and returns, drainage ditches and construction on aquatic lands, and furthermore, includes maintenance or repair involving any of the above activities.

m. "Reservation waters" means:

(1) all naturally occurring bodies of water within the exterior boundaries of the Reservation regardless of alternation by man, including but not limited to lakes, rivers, streams (including intermittent streams), mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholely manmade water bodies.

(2) tributaries of waters identified in subpart (1) above;

(3) wetlands adjacent to Reservation waters.

n. "Responsible perosn" means any person who undertakes a project or causes a project to be undertaken on aquatic lands.

o. "Tribal Council" means the duly elected governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

p. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include but are not limited to swamps, marshes, bogs and similar areas.

Section 2. Administration.

The Shoreline Protection Board of the Tribes, as created by Ordinance 64A (Revised), shall have the powers and duties associated with implementation of this Ordinance and any regulations promulgated hereunder. The rights, responsibilities and immunities of the Board, and the Tribal Council, as specified in Ordinance 64A (Revised) remain unchanged.

Section 3. Water Rights.

This Ordinance shall not be construed to diminish or divest any existing water uses established in accord with applicable law.

Section 4. Regulations.

The Tribal Council may promulgate regulations to implement the provisions of this Ordinance upon recommendation of the Board. Regulations shall be promulgated pursuant to procedures contained in the Tribal Administrative Procedures Ordinance.

PART IV
PERMITS

Section 1. Permit Required.

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

Section 2. Permit Fees.

An application for a permit shall be accompanied by payment of a non-refundable fee to cover some costs associated with permit issuance and administration. The amount of the fee shall be fixed from time to time by regulation, shall take into account the scope of the proposal, and shall be reasonable.

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

b. The application shall be on a form provided by the Office and shall include, but is not limited to, a location map, a specific description of the proposed project, the purpose and need for the project, practical alternative methods of implementing the project, and a plan specifying the type, quantity and source of materials to be used, means of access to the project area, the length of time necessary to complete the project, and the name, address and telephone number of the responsible person.

Section 4. Evaluation of Proposed Projects.

a. The Administrator of the Office shall review an application for a permit for adequacy and for project technical feasibility, shall determine if the proposal constitutes a project, and may make such on-site investigations as are necessary to perform these duties.

b. If the Administrator determines that the proposal is not a project the Administrator shall so state in a written notice to the person responsible for the project within 14 days of receipt of the application.

c. If the Administrator determines that the proposal is for a project, the Administrator shall bring the application before the Board at the next regularly scheduled Board meeting or may call a special Board meeting if circumstances so require.

d. The Board shall review all applications. The Board shall either approve, approve with modifications or alternatives, or disapprove an application and shall state its decision in writing to the responsible person.

e. Upon approval or upon approval with modification or alternatives, the Administrator shall forward to the responsible person a permit which shall relate to the plan for the project approved by the Board, and which may include provisions for mitigation of adverse impacts associated with the project.

Section 5. Emergencies.

a. The provisions of this Section do not apply to emergency actions which are necessary to safeguard life or property during periods of immediate and substantial endangerment to life or property. The responsible person under this Section shall notify the Office in writing of the emergency undertaking within fifteen (15) days of commencement of such undertaking.

b. The Administrator shall make an on-site inspection of an action and cause a written report of such observations to be filed in with the Office and a copy shall be sent to the responsible person. The report shall include:

(1) a finding as to whether or not an emergency situation existed at the time the action was taken;

(2) a finding as to whether or not the action constitutes a project; and

(3) if the findings required in subparagraphs (1) and (2) above are affirmative, and a permanent solution is feasible, recommend in writing that the responsible person put the solution into effect within a specified reasonable amount of time pursuant to a duly issued permit. Failure of the responsible person to put the solution into effect is not a violation of this Section unless a substantially similar action arises from such failure to act.

Section 6. Modification or Revocation of Permit.

The Board may, upon a finding of non-compliance or upon a finding of necessity, either modify or revoke a permit after the responsible person has been afforded notice and an opportunity to be heard.

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized ageny [sic] may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars for each day that the responsible person continues to engage in or maintains a non-conforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

PART VI [sic]

REVIEW, SEVERABILITY, EFFECTIVE DATE

Section 1. Administrative Appeal of Board Action.

A person aggrieved by a final action of the Administrator or the Board may seek review of such action pursuant to procedures contained in the Tribal Administrative Procedures Ordinance, Ordinance 86A. For purposes of administrative review, a decision of the Board shall constitute final agency action, appealable to an administrative law judge.

Section 2. Judicial Review.

a. The Tribal Court of the Confederated Salish and Kootenai Tribe shall have jurisdiction to hear and decide all causes arising under this Ordinance and implementing regulations and to hear appeals from agency actions upon exhaustion of administrative remedies.

b. The decision of the Tribal Court shall be final.

Section 3. Severability.

If any provision of this Ordinance or the applicability thereof is held invalid by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

Section 4. Effective Date.

This Ordinance shall become effective, pursuant to the terms of Article VI, Section 2 of the Tribes' Constitution, upon promulgation of implementing regulations by the Tribes.

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985, with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (1), (n), (t) and (u) of the Tribes' Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James J. Steele
Vice-Chairman,
Tribal Council

ATTEST:

/s/ Illegible
Executive Secretary

APPROVAL:

_____
Title: _____
Bureau of Indian Affairs

Date: _____

APRPOVED:
/s/ Donovan R. Boldt
SUPERINTENDENT

Received Office of
Superintendent

Treaty of Hellgate
July 16, 1855 (12 Stat. 975)

Article 3.

. . . The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

No. 92-1757

Court, U.S.
FILED
JUN 03 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN,
FLATHEAD JOINT BOARD OF CONTROL,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Henry Normandeau,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. IN LIGHT OF THE MANY PEOPLE AFFECTED BY THIS ISSUE, THE FUNDAMENTAL RIGHTS AT STAKE, AND THE RESPONDENTS' DISREGARD FOR BOTH THIS COURT'S DECISIONS AND CONSTITUTIONAL LIMITS ON TRIBAL GOVERNMENT AUTHORITY OVER NONMEMBERS, IMMEDIATE REVIEW BY THE COURT IS APPROPRIATE.

The Petitioners (hereinafter "Middlemist") and the tribal government respondents (hereinafter "CSKT government") agree on certain fundamental facts: the Bill of Rights does not limit tribal governments, and individuals under their power do not enjoy the basic protections it provides; other Constitutional limits do not bind tribal governments, since their retained sovereignty after incorporation within the United States derives from some unidentified, extra-constitutional source; and nonmembers have no right of political participation in tribal government. Nonetheless, the United States, acting through its agencies, has required Middlemist to submit to tribal authority and the CSKT government's limitations on the use of their own fee land contained in tribal Ordinance 87A.[1]

The inescapable consequence of these facts is that the issue raised here goes to the security of the constitutional rights and protections of nearly 400,000 nonmembers residing on Indian reservations nationwide.[2] It goes to

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[1] The federal Respondents, however, did not respond to Middlemist's Petition, failing to explain to the Court their grounds for this action. They also fail to explain whether they approve of the piecemeal litigation which will result if Middlemist must first go to tribal forums to vindicate their rights against the tribal defendants and then to federal courts to vindicate the same rights against federal actors.

[2] The frequency with which this Court addresses issues of tribal jurisdiction and State jurisdiction on reservations indicates the importance of these issues in general. Most often, the Court hears from the sovereigns involved. In this case, nonmembers, who rarely have the resources to bring such challenges but who are the source of the State's sovereign interest in these issues, seek to defend their

whether this Court's decisions bind tribal governments and bar baseless assertions of authority over nonmembers on their own fee land. It goes to whether tribal governments, aided and abetted by the federal government, will be allowed to systematically ignore substantive decisions limiting tribal jurisdiction, hiding behind the cloak of the "exhaustion" doctrine even when a facial challenge to their asertions of power is brought and no ongoing tribal proceeding exists. It goes to whether the "exhaustion" doctrine applies when federal defendants who are proper parties cannot be brought into tribal court, when the result would be piecemeal litigation which strips plaintiffs of their right to control their litigation and have their grievances against federal actors heard in a federal forum.

These facts and this Court's decisions, particularly *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), demonstrate the federal and CSKT governments' assertion of tribal jurisdiction here clearly violates constitutional and decisional limits on tribal governmental authority. The CSKT government prefers to rely on two inapposite decisions concerning the exhaustion of tribal remedies, citing them for the proposition that tribal government presumptively possesses the authority Middlemist challenges. *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).[3] The CSKT government baldly as-

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own rights, rather than the sovereign interests of the State. There are, however, no conflicts between these interests.

[3] The CSKT government places much confidence in the Ninth Circuit Court of Appeals' decisions concerning this doctrine which have expanded on the decisions of this Court to create, in essence, a mandatory "exhaustion" rule. (Response, p. 5, n.4.) Indeed, the Respondents argue the Ninth Circuit has repeatedly and fully addressed the issues here, and, based on that, the outcome in the Court of Appeals will undoubtedly favor the CSKT government's position. Response, p. 5, n.4. If correct, this only strengthens Middlemist's argument that immediate review in this Court is appropriate.

serts that Middlemist should "accept the fact of life" that the Bill of Rights and other Constitutional protections are simply not available to nonmembers under tribal government control. (Response, p. 9.)

The CSKT government however, never explains how it could possibly possess the governmental power at issue here when *Montana* and *Brendale* unequivocally teach that in the absence of express congressional delegation of authority, tribal governments lack authority over nonmembers in this situation. In addition to ignoring the holdings of these decisions, the CSKT government ignores the Court's unequivocal statement in *Brendale*, 492 U.S. at 427, n.10, that the decisions in *National Farmers* and *Iowa Mutual* did not address the substance of tribal sovereignty, which is the central issue here. Indeed, Middlemist has clearly and correctly argued the applicability of a recognized exception to the exhaustion doctrine for cases where the challenged action patently violates jurisdictional limits, which brings the substance of tribal government jurisdiction over nonmembers directly into question.

II. THE CHALLENGED TRIBAL ORDINANCE AND FEDERAL ACTIONS CLEARLY VIOLATE CONSTITUTIONAL AND DECISIONAL LIMITS ON TRIBAL AUTHORITY OVER NONMEMBERS AND CAN ONLY BE HEARD IN A FEDERAL FORUM.

Middlemist stands on the strength of this Court's clear pronouncements in *Montana* and *Brendale*, as well as the long line of decisions on which they are based. These decisions hold that in this relatively narrow situation—involving nonmember fee land within the boundaries of a reservation opened by Congress to nonmember settlement, from which nonmembers may not be excluded, and in the absence of an express and unequivocal delegation of authority from Congress—tribal governments lack jurisdiction over the activity of nonmembers. *Montana* clearly established the general principle, and set out the support-

ing reasons, that tribal governments do not have authority in this situation. *Montana* 450 U.S. at 564-566.

Brendale further advanced the analysis to the point where, in the factual situation presented by the Comlaint here, which the CSKT government cannot materially dispute, there can be no question tribal government lacks the authority it asserts. In this situation *Brendale* clearly taught that a detailed study of the impact on a particular Tribe's preconstitutional sovereignty resulting from specific treaties, congressional acts and executive branch policies is not necessary (although the result would be the same here). *Brendale,* 492 U.S. at 426, n.9. Instead, in this situation, which involves tribal government's "external relations," general principles of law hold that tribal governments lack authority, and specific treaties or statutes need not be consulted. *Id.*

Middlemist's position ultimately rests on the Constitution and the rights and protections it offers all citizens. This foundational limit on tribal government authority over nonmembers on their own fee land, Middlemist submits, has been implicit in the Court's decisions from the earliest encounters with the issue. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Because of the relatively recent refusal of some tribal governments, notably the CSKT government, to admit any fundamental limits on their power, the implicit constitutional bases for limiting tribal jurisdiction over nonmembers to "very narrow" circumstances must be made explicit. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, —— U.S. ——, 112 S.Ct. 683, 692 (1992).

There exists no reason to await, as the CSKT government suggests, the development of an enormous body of data illustrating the pernicious effects of tribal governance of nonmembers to whom it accords no rights. Response, p. 8. There is nothing to be gained in developing "reams of findings, studies and analysis" detailing civil rights and human rights abuses by nondemocratic tribal governments in dealing with nonmembers. *Id.* Neither tribal govern-

ments nor nonmembers would benefit from delaying the resolution of this matter until a crisis atmosphere arises. Segregation in public schools and denial of voting rights were patently unconstitutional acts when they occurred in the 1950's and 1960's and before, and today such actions would not require reams of findings and studies concerning their ill-effects to be judicially halted. The CSKT government's assertion of authority over nonmembers, to whom it accords no political rights, is no different.

The struggle to secure respect for the basic rights of all citizens has been long and arduous. Now, after almost two-hundred years of jurisprudence recognizing fundamental limits on tribal government authority over nonmembers, after many years spent by this Court expounding, defining and protecting the civil rights and liberties of U.S. citizens, there is no reason to turn away from this historical limit on tribal authority and leave nonmembers in a position where their constitutional rights are neither respected nor protected.

CONCLUSION

Middlemist respectfully asks the Court to reject the CSKT government's denigration of the fundamental rights at issue here and to issue the Writ of Certiorari to the Ninth Circuit Court of Appeals requested in the Petition.

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Respectfully submitted,

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